No. 08-1134

Title: United Student Aid Funds, Inc., Petitioner
v.
Francisco J. Espinosa

Docketed: March 12, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (06-16421)
Decision Date: October 2, 2008
Rehearing Denied: December 10, 2008

Questions Presented

Date	Proceedings and Orders
Mar 10 2009	Petition for a writ of certiorari filed. (Response due April 13, 2009)
Apr 6 2009	Order extending time to file response to petition to and including May 13, 2009.
Apr 10 2009	Brief amici curiae of National Council of Higher Education Loan Programs, Inc., et al. filed.
Apr 10 2009	Brief amicus curiae of Educational Credit Management Corporation filed.
Apr 13 2009	Brief amici curiae of Oregon, et al. filed.
May 12 2009	Brief of respondent Francisco J. Espinosa in opposition filed.
May 22 2009	Reply of petitioner United Student Aid Funds, Inc. filed.
May 26 2009	DISTRIBUTED for Conference of June 11, 2009.
Jun 15 2009	Petition GRANTED.
Jul 10 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 28, 2009.
Aug 28 2009	Joint appendix filed. (Statement of costs filed)
Aug 28 2009	Brief of petitioner United Student Aid Funds, Inc. filed.
Sep 3 2009	Brief amicus curiae of United States filed.
Sep 3 2009	Brief amicus curiae of International Municipal Lawyers Association filed.
Sep 3 2009	Motion for leave to file amicus brief of Professor Rafael I. Pardo in support of neither party filed..
Sep 4 2009	Brief amicus curiae of Educational Credit Management Corporation filed.
Sep 4 2009	Brief amicus curiae of National Council of Higher Education Loan Programs, Inc. filed.
Sep 4 2009	Brief amici curiae of Oregon, et al. filed.
Sep 17 2009	The time within which to file respondent's brief on the merits is extended to and including October 13, 2009.
Sep 28 2009	SET FOR ARGUMENT ON Tuesday, December 1, 2009.
Oct 2 2009	CIRCULATED
Oct 13 2009	Brief of respondent Francisco J. Espinosa filed. (Distributed).
Oct 16 2009	Brief amici curiae of Professors Richard Aaron, et al. filed. (Distributed)
Oct 19 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 19 2009	Record received from the U.S.D.C. for the District of Arizona. (1 envelope). The remainder of this record is electronic.
Oct 20 2009	Motion for leave to file amicus brief filed by Professor Rafael I. Pardo in support of

	neither party GRANTED.
Oct 20 2009	Brief amicus curiae of National Association of Consumer Bankruptcy Attorneys filed. (Distributed)
Oct 20 2009	Brief amicus curiae of G. Eric Brunstad, Jr. (Distributed).
Oct 20 2009	Brief amicus curiae of National Association of Chapter Thirteen Trustees filed. (Distributed)
Nov 2 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 12 2009	Reply of petitioner United Student Aid Funds, Inc. filed. (Distributed)
Dec 1 2009	Argued. For petitioner: Madeleine C. Wanslee, Phoenix, Ariz.; and Toby J. Heytens, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Michael J. Meehan, Tucson, Ariz.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Student loans are statutorily non-dischargeable in bankruptcy unless repayment would cause the debtor an "undue hardship." Debtor failed to prove undue hardship in an adversary proceeding as required by the Bankruptcy Rules, and instead, merely declared a discharge in his Chapter 13 plan. Are the orders confirming the plan and discharging debtor void?

2. Bankruptcy Rules permit discharge of a student loan only through an adversary proceeding, commenced by filing a complaint and serving it and a summons on an appropriate agent of the creditor. Instead, debtor merely included a declaration of discharge in his Chapter 13 plan and mailed it to creditor's post office box. Does such procedure meet the rigorous demands of due process and entitle the resulting orders to respect under principles of res judicata?

RULE 29.6 STATEMENT

Petitioner United Student Aid Funds, Inc. is a private nonprofit corporation established under the laws of the State of Delaware. It has no parent company, and no publicly held company holds any membership interest in it. Its members are the individuals on its Board of Trustees.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner United Student Aid Funds, Inc. respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, filed in the above-entitled proceeding on December 10, 2008.

OPINIONS BELOW

The memorandum decision of the United States Bankruptcy Court for the District of Arizona (App. 71, *infra*) and the order of the United States District Court for the District of Arizona (App. 60, *infra*) are unreported. The opinion of the court of appeals remanding for additional findings (*Espinosa I*, App. 51, *infra*) is reported at 530 F.3d 895. The opinion of the court of appeals following remand (*Espinosa II*, App. 28, *infra*) is reported at 545 F.3d 1113. The amended opinion of the court of appeals following denial of rehearing (*Espinosa III*, App. 1, *infra*) is reported at 553 F.3d 1193.

JURISDICTION

The original opinion of the Court of Appeals for the Ninth Circuit was filed on October 2, 2008. A timely petition for rehearing *en banc* was denied and an amended opinion was filed on December 10, 2008.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

11 U.S.C. § 1325. Confirmation of plan.

(a) [T]he court shall approve a plan if –

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title.

11 U.S.C. § 1327. Effect of confirmation.

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. § 1328. Discharge.

(a) As soon as practicable after completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –

. . . .

(2) of the kind specified in paragraph . . . (8) . . . of section 523(a) of this title. . . .

11 U.S.C. § 523. Exceptions to discharge.

(a) . . . (8) for an educational . . . loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, . . . unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

STATEMENT OF THE CASE

This case raises an important question, which courts have observed is recurring with increasing frequency, regarding the propriety of the debtor-created tactic for obtaining a bankruptcy discharge of a student loan, known as a "discharge-by-declaration," without proving "undue hardship" as required by statute, and without commencing an adversary proceeding and giving the creditor individual notice by service of a summons and complaint as required by bankruptcy court rules.

In 1988-89, respondent Francisco J. Espinosa obtained four student loans totaling $13,250 through the Federal Family Education Loan Program ("FFELP"). His loans were government guaranteed. In 1992, Espinosa filed a Chapter 13 bankruptcy petition that listed his student loans as his only debts. At that time, Espinosa's notes were held by petitioner United Student Aid Funds, Inc. ("USA Funds").

Espinosa's proposed plan provided for payment over time of only the principal amount of his loans, and declared that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." In other words, all accrued and post-petition interest would be discharged under the plan. Although student loans are non-dischargeable except in circumstances of "undue hardship," which the Federal Rules of Bankruptcy Procedure require the debtor to prove in an adversary proceeding, Espinosa failed to commence an adversary proceeding to seek a discharge of his student loan interest debt. The plan made no mention that Espinosa would suffer "undue hardship" if the accrued and accruing interest on his debt was not discharged. It simply declared a discharge.

Notice of the case and the plan was given to USA Funds only by mail at the post office box address used to receive loan payments. Espinosa did not serve the plan on a USA Funds' officer, managing or general agent, or other agent authorized to receive service of process, as a summons and complaint in an adversary proceeding against a corporation must be served.

USA Funds filed a proof of claim for $17,832, to which Espinosa did not object. USA Funds did not object to the plan, which the court confirmed in 1993 without any finding of undue hardship. The confirmation order made no express mention of Espinosa's student loan debt. After confirmation of the plan, the trustee gave notice to USA Funds that its claim differed from the amount listed in the plan and would

be paid according to the plan unless such treatment was disputed.

Espinosa paid pursuant to the plan, and a standard discharge order was entered in 1997. That order excepted from discharge any debt "for a student loan . . . as specified in 11 U.S.C. § 523(a)(8)."

Espinosa's loans were subrogated to the United States Department of Education pursuant to a reinsurance agreement. In 2000, the Education Department commenced collection efforts, and caused the Treasury Department to intercept Espinosa's income tax refunds. In 2003, Espinosa filed a motion alleging violation of the discharge injunction. USA Funds recalled the loans from the Education Department and moved under FED. R. CIV. P. 60(b)(4) for relief from the confirmation order on the ground it is void. The bankruptcy court ruled for Espinosa. USA Funds appealed to the district court, which reversed, ruling that the confirmation order is void for lack of due process and therefore had no res judicata effect.

Espinosa appealed to the Ninth Circuit. That court remanded to the bankruptcy court for a determination whether exclusion of Espinosa's student loan debt from the discharge order was a clerical error. (*Espinosa I.*) The bankruptcy court ruled that it was. (App. 4-5, *infra.*) The court of appeals then reversed the district court. In an opinion authored by Chief Judge Kozinski, it was held that a debtor may obtain discharge of a student loan by merely including it in a Chapter 13 plan, without proving undue

hardship in an adversary proceeding, if the creditor fails to object to the plan. Therefore, the orders confirming Espinosa's plan and discharging his debt were held to be valid and final. (*Espinosa II.*) USA Funds petitioned for rehearing *en banc*, which the court denied with an order amending its opinion. (*Espinosa III.*)

Jurisdiction in the proceedings below was granted to the bankruptcy court by 28 U.S.C. §§ 151 and 157(b), to the district court by 28 U.S.C. § 158(a)(1), and to the court of appeals by 28 U.S.C. §§ 158(d)(1) and 1291.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit allows student loan debtors to discharge their debts in bankruptcy without proving "undue hardship," contrary to the statutory requirement recognized by this Court. The Ninth Circuit is the only court of appeals to permit this result; five others reach the opposite conclusion on indistinguishable facts. The decision below is not merely erroneous, it is intolerable given the necessity of national uniformity in bankruptcy law. In view of the circuit split and the Ninth Circuit's refusal to adopt the prevailing view, only this Court can resolve this recurring issue.

I. The Ninth Circuit's decision conflicts with principles expressly recognized in this Court's ruling in *Tennessee Student Assistance Corp. v. Hood.*

This Court has previously recognized that Congress intended to make it more difficult for debtors to discharge student loans, and that the statutes and Bankruptcy Rules provide that such loans are not discharged unless the bankruptcy court, through an adversary proceeding, expressly determines that excepting the debt from discharge would impose an "undue hardship":

> Student loans used to be presumptively discharged in a general discharge. But in 1976, Congress provided a significant benefit to the States by making it more difficult for debtors to discharge student loan debts guaranteed by States. That benefit is currently governed by 11 U.S.C. § 523(a)(8), which provides that student loan debts guaranteed by governmental units are not included in a general discharge order unless excepting the debt from the order would impose an "undue hardship" on the debtor.
>
> Section 523(a)(8) is "self-executing." Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt.
>
> . . . .
>
> Creditors generally are not entitled to personal service before a bankruptcy court

> may discharge a debt. Because student loan debts are not automatically dischargeable, however, the Federal Rules of Bankruptcy Procedure provide creditors greater procedural protection. The current Bankruptcy Rules require the debtor to file an "adversary proceeding" against the State in order to discharge his student loan debt. . . . [A]s prescribed by the Rules, an "adversary proceeding" requires the service of a summons and a complaint.

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 449-452 (2004) (internal citations omitted).[1]

While the Ninth Circuit recognized that USA Funds was making precisely the same "statutory" argument found in *Hood*, it held that its own decision in *Great Lakes Higher Educ. Corp. v. Pardee* (*In re Pardee*), 193 F.3d 1083 (9th Cir. 1999), "forecloses this argument." App. 6-8, *infra*. The essence of *Pardee*, as the Ninth Circuit states, is that a discharge order is a final judgment. *Id.*

The Ninth Circuit also recognized that USA Funds relied "heavily" on *Hood*, but dismissed that authority because "the Supreme Court recognized in

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[1] Certiorari was granted in *Hood* to determine whether the Bankruptcy Clause gives Congress the authority to abrogate States' immunity from private suits. 541 U.S. at 443. Without reaching that question, *Hood* upheld the application of the Bankruptcy Code to adversary proceedings initiated by a debtor against a state guaranty agency to determine the dischargeability of a student loan debt. 541 U.S. at 451.

Hood that an adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to adjudication of the discharge of a student loan." App. 17-18, *infra*, quoting KEITH M. LUNDIN, *Chapter 13 Bankruptcy* § 346.1 (3d ed. 2000 & Supp. 2004).

Although *Hood* observed that "[t]he text of § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion, . . . which would raise no constitutional concern," 541 U.S. at 453, what the court of appeals failed to recognize is that *Hood* does not sanction discharge-by-declaration and instead affirmed that "the Bankruptcy Court cannot discharge [student loan] debt without making an undue hardship determination." 541 U.S. at 453-454. "[T]he *Hood* Court's suggestion, in an entirely different context, that a debtor could proceed by motion in the absence of the Bankruptcy Rules does not authorize debtors to ignore the requirements of the Rules." *In re Hanson*, 397 F.3d 482, 487 (7th Cir. 2005).

It is therefore clear that the Ninth Circuit has decided an important and recurring federal question in a way that conflicts with a relevant decision of this Court. However that result occurred, whether through misconstruction, misapplication, or misconception of *Hood*, it cannot stand.

II. The Ninth Circuit has decided an important and recurring issue of bankruptcy law in a manner that conflicts with rulings of the Second, Fourth, Sixth, Seventh and Tenth Circuits.

A. The circuits expressly acknowledge the conflict.

By its decision, the Ninth Circuit has isolated itself and created a geographically-based dual system of bankruptcy law in which student loan debtors and creditors have different rights, and may or must use different procedures, regarding the discharge of student loan debt, depending on where the debtor is located.[2]

The conflict was expressly recognized by the Ninth Circuit: "Two circuits [citing the Second and Tenth] have disagreed with *Pardee*, and accepted USA Funds's statutory argument." (App. 8, *infra*.) "While we are bound by *Pardee*, we have taken a close look at the contrary holdings of our sister circuits. . . ." (App. 17, *infra*.) "Three circuits [citing the Fourth, Sixth and Seventh] have held . . . that a student loan debtor's failure to commence an adversary proceeding

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[2] The decisions in conflict with the Ninth Circuit are *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296 (4th Cir. 2002); *In re Hanson*, 397 F.3d 482 (7th Cir. 2005); *Ruehle v. Educational Credit Mgmt. Corp. (In re Ruehle)*, 412 F.3d 679 (6th Cir. 2005); *Whelton v. Educational Credit Mgmt. Corp.*, 432 F.3d 150 (2d Cir. 2005); and *Educational Credit Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007).

by serving the student loan creditor with a complaint and summons, denies the creditor due process." (App. 18, *infra*.) "It is thus fair to say that our position in *Pardee* is in the minority; indeed, among the circuits we now stand alone." (App. 56, *infra*.)

In re Mersmann, the most recent of the conflicting decisions cited by the Ninth Circuit, observes that "only [the Ninth Circuit] . . . permit[s] discharge-by-declaration." 505 F.3d at 1045 (citing *Pardee*). In opposition, according to *Mersmann's* survey of the cases, stand the Second, Fourth, Sixth, and Seventh Circuits. *Id*. at 1046-47. The Tenth Circuit joined that majority in *Mersmann* by adopting the reasoning of the other circuits and rejecting discharge-by-declaration. *Id*.

Express recognition of the conflict within the circuits as it was emerging and widening is also found in *In re Banks*, 299 F.3d at 299, 301; *In re Repp*, 307 B.R. 144 (B.A.P. 9th Cir. 2004), *rev'd, Espinosa II* and *III*; *In re Hanson*, 397 F.3d at 485; *In re Ruehle*, 412 F.3d at 683-84 (stating that *Banks* and *Hanson* "represent an evolving majority view"); and *Whelton*, 432 F.3d at 153.

The conflict between the Ninth and five other circuits is therefore clearly pronounced.

The fact pattern of the cases across the circuits parallels the facts here. Each case involved a Chapter 13 bankruptcy in which the debtor proposed a plan that would, by varying language, effect a discharge of student loan debt by mere declaration.

Notice of the plans was given to creditors, who did not object. No adversary proceedings were commenced, and no showing or ruling of undue hardship was made. Despite the obvious violations of the Bankruptcy Code and Rules, the plans were confirmed. No appeal was taken from the confirmation orders or the subsequent discharge orders. Thus, the Ninth Circuit characterizes the cases as "similar." App. 23, *infra*. Indeed, they are substantially indistinguishable.

Notably, *Mersmann* overruled *Andersen v. UNIPAC-NEBHELP* (*In re Anderson*), 179 F.3d 1253 (10th Cir. 1999), the seminal case the Ninth Circuit followed in *Pardee*. Given the Ninth Circuit's refusal in this case to overturn *Pardee*, as the Tenth Circuit did *Andersen*, there is no point in waiting any longer for the Ninth Circuit to eliminate the conflict with its sister circuits.

Neither is there reason to await future cases in other circuits before resolving the clearly existing conflict. Every circuit that has considered the issue of discharge-by-declaration since *Andersen* and *Pardee*, except the Ninth, has rejected that debtor's ploy. It is therefore clear that a prevailing rule has emerged.

B. The issue presented by the conflict is recurring and of substantial national importance.

The Ninth Circuit's decision has set the national stage for continued disparate treatment of the significant issue of discharge of student loans by declaration. Student loans are prevalent and their total dollar magnitude is substantial.[3] At the same time, personal bankruptcy filings are escalating.[4] Recurrence of the issue is therefore certain. Indeed, experience teaches that debtors in circuits that have yet to decide the issue will seek to discharge student loan debt through the gambit of discharge-by-declaration. As the Fourth Circuit observed in *Banks*: "The number of Debtors seeking to improperly discharge nondischargeable debt increased significantly following the decisions of our sister Circuits in *In re Andersen* and *In re Pardee*. *See* [*In re Evans*, 242 B.R. 407 (Bankr.S.D. Ohio 1999)] (citing cases and noting

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[3] "The federal student financial assistance programs involve more than 6,200 postsecondary institutions, more than 3,100 lenders, 35 guaranty agencies, and many third-party servicers. During FY 2008, Federal Student Aid (FSA) provided $96 billion in awards and oversaw an outstanding loan portfolio of more than $500 billion." U.S. DEPT. OF EDUC., FINANCIAL AND PERFORMANCE QUARTERLY UPDATE, Issue 2008-2, at 7 (Sept. 30, 2008).

[4] Non-business bankruptcy filings increased 31 percent in 2008 compared to 2007, and also increased in 2007 over 2006. ADMIN. OFFICE OF THE U.S. COURTS, News Release, BANKRUPTCY FILINGS UP IN CALENDAR YEAR 2008 (Mar. 5, 2009), www.uscourts.gov/Press_Releases/2009/BankruptcyFilingsDec2008.cfm.

frustration with the trend)." 299 F.3d at 301. Needless to say, this situation will persist until this Court settles the question.

In addition to the fact that issues of bankruptcy law are, by their very nature, of national importance, the significance of the current conflict among the circuits is underscored by the Bankruptcy Clause of the Constitution, which gives Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. This Court monitors those laws for uniformity. *See Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902). Likewise, the Court should monitor and ensure that the uniform laws are uniformly applied. "The Constitutional requirement of uniformity . . . is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country. . . ." *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946).

The discharge of student loan debt is also a matter of public importance. The improper discharge of non-dischargeable student loan debt harms the public in general because unpaid government guaranteed student loans are ultimately paid by all of us as taxpayers.

Finally, the tactic of discharge-by-declaration threatens to transcend its application to student loans. If not abolished, use of the tactic could spread to other presumptively non-dischargeable debts such as child support, alimony, fines, and taxes. *Pardee*

avoided addressing the issue in such other contexts. 193 F.3d at 1087, n. 6.

III. The decision below is incorrect.

A. Discharging student loan debt through mere declaration in a Chapter 13 plan without proving "undue hardship" through an adversary proceeding violates the Bankruptcy Code and Rules and is therefore void.

Although Espinosa proposed a plan that did not comply with the Bankruptcy Code, and the bankruptcy court's approval of the noncompliant plan was also contrary to the Code, the Ninth Circuit nevertheless held that the discharge order was not void because USA Funds had not objected to the plan. App. 8, *infra*. That decision is erroneous because it ignores Congress' clear intent to severely restrict student loan discharges and prohibit approval of Chapter 13 plans that do not comply with that restriction. *In re Mersmann*, 505 F.3d 1033; *Whelton*, 432 F.3d 150.

To fully appreciate and give effect to the intent of Congress, it bears repeating that educational loans, which formerly were readily dischargeable, are now presumptively non-dischargeable in bankruptcy. Since 1976, Congress has made it increasingly more difficult to discharge student loan debts. *Hood*, 541 U.S.

at 449, citing statutory amendments.[5] The objective is to preserve the student loan program and "assure future generations of students will also have an educational loan available. . . ." 125 CONG. REC. S. 9160 (daily ed. July 11, 1979) (remarks of Sen. DeConcini). The Bankruptcy Code now allows discharge for one – and only one – reason, namely, that "excepting such debt from discharge . . . will impose an undue hardship on the debtor." 11 U.S.C. § 523(a)(8).

This Court has recognized that § 523(a)(8) is "self-executing." *Hood*, 541 U.S. at 450. Therefore, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." *Id.* "Simply embedding a 'meaningless incantation of undue hardship' in a confirmation plan falls short of the 'affirmative' action required by Congress and the Supreme Court." *In re Mersmann*, 505 F.3d at 1048. Likewise, any reason for discharge that is merely proclaimed in a plan is ineffective.

The exclusive procedure for determining the dischargeability of a debt is an adversary proceeding. FED. R. BANKR. P. 7001(6). In other words, "under 11 U.S.C. § 1328(a) the Bankruptcy Court lack[s] the authority to grant a discharge of . . . student loan

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[5] A review of the "progressively more restrictive" requirements for student loan discharge is found in *In re Mersmann*, 505 F.3d at 1042.

debt through the ordinary confirmation process." *Whelton*, 432 F.3d at 154-55.

Because post-petition interest on student loan debt is also non-dischargeable, *Bruning v. United States*, 376 U.S. 363 (1964), a debtor seeking its discharge must also bring an adversary proceeding. *E.g.*, *In re Banks*, 299 F.3d at 300.

"An adversary proceeding is treated as a separate dispute between the Debtor and Creditor. . . ." *In re Banks*, 299 F.3d at 296. It is an "individualized determination." *Hood*, 541 U.S. at 450. The adversary proceeding is modeled on the traditional civil litigation format, either incorporating or adapting most of the Federal Rules of Civil Procedure. FED. R. BANKR. P. 7001, Advisory Committee Notes. Accordingly, an adversary proceeding is commenced by the filing of a complaint, *id.*, R. 7003 (incorporating FED. R. CIV. P. 3), which must then be served with a summons, *id.*, R. 7004.[6]

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[6] The burden of proving undue hardship is on the debtor. *E.g.*, *Rifino v. United States* (*In re Rifino*), 245 F.3d 1083, 1087-88 (9th Cir. 2001). To determine if excepting student loan debt from discharge will impose an undue hardship, most circuits apply the three-part test first enunciated in *In re Brunner*, 831 F.2d 395, 396 (2d Cir. 1987), and adopted by the Ninth Circuit in *United Student Aid Funds, Inc. v. Pena* (*In re Pena*), 155 F.3d 1108, 1112 (1998). Under the *Brunner* test, the debtor must prove that (1) he cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if required to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to

(Continued on following page)

Because student loan debts may only be discharged upon a finding of undue hardship, a plan that merely declares that such a debt will be wholly or partially discharged upon completion of the plan does not comply with the Code and the Rules, and therefore may not be confirmed. Congress has expressly instructed that plans that do not comply with the Code are not to be approved:

> [T]he court shall approve a plan if –
>
> (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title.

11 U.S.C. § 1325(a). *Accord*, *In re Mersmann*, 505 F.3d at 1048 ("§ 1325(a)(1) of [the] Code permits the confirmation of a plan *only* if it is consistent with the rest of the Code"). *Mersmann* therefore concluded that "a bankruptcy court lacks authority to confirm a plan provision that seeks to discharge a student loan debt without an adversary proceeding proving 'undue hardship.'" *Id.*, at 1049.

Failure to comply with the Code has been said to render the plan and any confirming order "nugatory." *In re Hanson*, 397 F.3d at 487, citing *In re Escobedo*, 28 F.3d 34, 35 (7th Cir. 1994). Otherwise stated, the

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persist for a significant portion of the repayment period; and (3) the debtor has made good faith efforts to repay the loan. Thus, the barriers to discharge of student loan debt are high, no doubt explaining why debtors attempt to discharge student loan debt by declaration.

offending provision for discharge of student loan debt is "void *ab initio*." *Whelton*, 432 F.3d at 156, n. 2.

Likewise, the subsequent discharge order is also void. "A discharge obtained in this manner [by declaration], *i.e.*, 'without filing an adversary proceeding to establish undue hardship,' is plainly 'contrary to the express language of the Bankruptcy Code and Rules.' Thus, it is properly treated as 'void.'" *Whelton*, 432 F.3d at 154, quoting *In re Hanson* (internal citations omitted).

Finally, giving finality to a confirmation order premised upon a discharge-by-declaration puts two statutes in needless conflict and renders one of them partially ineffective. Specifically, applying 11 U.S.C. § 1327(a) to give finality to such a confirmation order conflicts with 11 U.S.C. § 1328(a)(2), which provides for discharge of all debts upon completion of the debtor's plan, except, *inter alia*, student loans. As stated in *Mersmann*, "[g]iving preclusive effect to a discharge-by-declaration through § 1327(a) renders part of § 1328(a)(2) nugatory." 505 F.3d at 1048. Because discharge-by-declaration violates the Code, the statutes must be harmonized by allowing § 1328(a)(2)'s specific pronouncement to limit § 1327(a)'s broad effect. *Id.*

For these reasons, the Ninth Circuit's decision is incorrect.

B. Discharging student loan debt through mere declaration in a Chapter 13 plan, rather than an adversary proceeding, is void for lack of the prescribed notice to the creditor.

Significant to this case is that, as noted above, an adversary proceeding is commenced by the filing of a complaint. Because a complaint must comply with Federal Rule of Civil Procedure 8(a), it must "show[ ] that the [debtor] is entitled to relief" and demand the relief sought. FED. R. BANKR. P. 7008 (incorporating FED. R. CIV. P. 8). Therefore, a complaint seeking to discharge a student loan debt upon grounds of undue hardship must allege facts satisfying the requisite elements (n. 6, *supra*) and pray for a discharge of the subject student loan debt. Moreover, the complaint must then be served with a summons. *Id.*, R. 7004. Service upon a corporation, such as USA Funds, must be made upon "an officer, a managing or general agent, or to any agent authorized by appointment or by law to receive service of process. . . ." *Id.*, R. 7004(b)(3).

In comparison, to confirm a Chapter 13 plan, notice of a proposed plan need only include a summary of the plan, not the actual plan. *Id.*, R. 3015(d). Furthermore, notice need only be sent by mail to creditors at the addresses provided by the debtor on his or her list of creditors. *Id.*, R. 2002(g)(2).

Accordingly, notice of a proposed plan does not require specific notice of the effect of the plan on each

creditor, and does not require notice to be served on a person of any particular level of responsibility. *In re Mersmann*, 505 F.3d at 1043; *In re Banks*, 299 F.3d at 301. Thus, the notice requirements to initiate an adversary proceeding are more exacting than the notice required for confirmation of a Chapter 13 plan. *In re Mersmann*, 505 F.3d at 1043.

In this case, Espinosa's plan (which made no mention of undue hardship or its requisite elements and was by no measure the functional equivalent of an adversary complaint) was merely mailed to USA Funds at the post office box address at which it received loan payments.[7] Nevertheless, because USA Funds received notice of Espinosa's case, and could have inquired into the effect of the proposed plan and objected to it, the Ninth Circuit held that USA Funds was not denied due process. That conclusion is incorrect. *In re Ruehle*, *supra*; *In re Hanson*, *supra*; *In re Banks*, *supra*.

While a confirmation order is generally binding, 11 U.S.C. § 1327(a), it does not have that effect when it is not preceded by the required notice. As this

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[7] Student loan lenders, like USA Funds, receive "tidal waves of mail." "The quantity 'of notice' that is issued by the bankruptcy system is so overwhelming that it is necessary to have clear rules in order for creditors to know what notices to notice as opposed to the notices that are deafening legal background noise. The Code and the Rules set forth those clear standards and it is up to the courts to ensure that the lines are not blurred." *In re Ruehle*, 412 F.3d at 684.

Court has stated, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) (citations omitted).

Applying that principal in the bankruptcy context, "[w]here the Bankruptcy Code and Bankruptcy Rules specify the notice required prior to entry of an order, due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect." *In re Banks*, 299 F.3d at 302 (citing *Mullane* and others). Alternatively stated, "[e]very person and entity is entitled to the *prescribed* level of notice for the process to be due. . . ." *In re Ruehle*, 412 F.3d at 684-85 (emphasis added). Anything less is "winking at due process, which is the cornerstone of justice." *Id.*, at 684. "In the end, . . . [d]ue process is not to be sliced, diced and disguised with sauce. Due process must be served whole, without garnish." *Id.*, at 685 (internal quotation and citation omitted).

Therefore, "where an adversary proceeding is required to resolve the disputed rights of the parties, the potential defendant has the right to expect that the proper procedures will be followed." *In re Banks*, 299 F.3d at 302 (citation and internal quotation omitted). Likewise stated, "[t]he creditor has a right to assume that he will receive all of the notices

required by statute before his claim is forever barred." *In re Mersmann*, 505 F.3d at 1049 (citation and internal quotation omitted). Accordingly, this Court has said that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 297 (1953).

In conclusion, "due process entitles creditors to the heightened notice provided by the Bankruptcy Code and Rules, and the dictates of due process trump policy arguments about finality." *In re Hanson*, 397 F.3d at 486, citing *Mullane*. Therefore, the decision of the Ninth Circuit is incorrect.

C. An order confirming a plan providing for discharge of student loan debt without proof of undue hardship in an adversary proceeding, and the subsequent discharge order, are not res judicata.

The confirmation and discharge orders herein, obtained as they were without proof of undue hardship in an adversary proceeding upon proper notice to USA Funds, violate the Bankruptcy Code and Rules and are not deserving of finality and preclusive effect.

Although the Ninth Circuit bases its ruling, in part, on the finality of discharge orders, the Second and Tenth Circuits disagree that such orders are entitled to preclusive effect in cases such as this.

Whelton, *supra*; *In re Mersmann*, *supra*. As explained by the Tenth Circuit in *Mersmann*, bankruptcy court orders premised upon a discharge-by-declaration fail several of the requirements of res judicata:[8]

> First of all, proper notice is the linchpin of a party's "full and fair opportunity to litigate" a claim. Res judicata will not apply where there is inadequate notice. Simply put, the failure to sufficiently apprise a creditor of a pending action which could eliminate the creditor's interest is a "deficiency that would undermine the fundamental fairness of the original proceedings."

505 F.3d at 1049 (citation omitted).

Such is the case here. USA Funds never had "proper notice" of Espinosa's desire to discharge his student loan debt. There was no adversary complaint to attract attention to his objective, and the plan itself was not served in a manner designed to do so. Thus, "the principles of res judicata must yield where the failure to follow the Code and Rules goes to the heart of the creditor's notice of the bankruptcy plan itself." 505 F.3d at 1050.

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[8] Res judicata requires the satisfaction of four elements: (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the party must have had a full and fair opportunity to litigate the claim in the prior suit. *E.g.*, *In re Mersmann*, 505 F.3d at 1049.

The Tenth Circuit also ruled that discharge of student loan debt without an adversary proceeding is not a judgment on the merits:

> Discharge-by-declaration also fails the first element of res judicata – whether the claim was "adjudicated on the merits." Res judicata only bars a collateral attack on claims that were "actually litigated and those that were or could have been raised in the first action."
>
> . . . .
>
> In short, if an issue must be raised through an adversary proceeding it will not have a preclusive effect unless it is actually litigated.

505 F.3d at 1050 (footnote omitted).

Others agree that res judicata is no bar to setting aside an illegal discharge of student loan debt. *Whelton, supra*; Kevin J. Driscoll Jr., *Eradicating the "Discharge by Declaration" for Student Loan Debt in Chapter 13*, 2000 U. Ill. L. R. 1311, 1329-31 (2000).

Finally, the original discharge order herein cannot bar USA Funds' attack on the discharge of Espinosa's student loan debt because that order specifically excepted such debt from discharge. Although the bankruptcy court, on remand, ruled that exclusion of Espinosa's student loan debt from the discharge order was a clerical error, the materially amended discharge order does not relate back to operate retroactively. *See Federal Trade Comm'n v.*

Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANCISCO J. ESPINOSA, *Plaintiff-Appellant*, v. UNITED STUDENT AID FUNDS, INC., *Defendant-Appellee*.	No. 06-16421 D.C. No. CV-04-00447-RCC ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted April 16, 2008
Submission Vacated June 24, 2008
Resubmitted August 29, 2008

San Francisco, California

Filed October 2, 2008
Amended December 10, 2008

Before: Alex Kozinski, Chief Judge,
A. Wallace Tashima and
N. Randy Smith, Circuit Judges.

Opinion by Chief Judge Kozinski

COUNSEL

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Madeleine C. Wanslee, Gust Rosenfeld P.L.C., Phoenix, Arizona, for the defendant-appellee.

ORDER

The opinion filed October 2, 2008 is amended as follows:

Page 14031, Line 32

> After the sentence ending with "persuasive," insert: "Rather, we agree with Judge Lundin that '*Pardee* and *Andersen* stand soundly for the better-reasoned principle that notice of how the Chapter 13 plan affects creditors' rights is all that the Constitution, the Bankruptcy Code and the Bankruptcy Rules require to bind creditors to the provisions of a confirmed plan under § 1327(a).' Keith M. Lundin, *Chapter 13 Bankruptcy* § 229.1 (3d ed. 2000 & Supp. 2004)."

Page 14031, Line 32

> Before the sentence beginning with "Seeing no reason," start a new paragraph and insert: "Funds also relies heavily on *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). But as Judge Lundin explains,

Hood is at best unhelpful and more likely undermines Funds's argument:

> Admittedly, sovereign immunity, not the preclusive effect of confirmation, was the issue in *Hood;* but the point remains that the Supreme Court recognized in *Hood* that an adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to adjudication of the discharge of a student loan. Many of the cases taking issue with *Pardee* and *Andersen* declare the contrary view that the discharge of a student loan by any procedure other than adversary proceeding violates due process. This premise is not consistent with *Hood.*

Keith M. Lundin, *Chapter 13 Bankruptcy* § 346.1 (3d ed. 2000 & Supp. 2004)."

Page 14034, Line 4

After the sentence ending with "proof of claim," insert: "Because 'due process does not require actual notice,' *Jones v. Flowers,* 547 U.S. 220, 225 (2006), it follows a fortiori that actual notice satisfies due process. We find the argument that the Constitution requires something *more* than actual notice strained to the point of the bizarre."

Page 14034, Line 4

Start a new paragraph at the sentence beginning with "The notices"

Page 14034, Lines 4-5

Replace "Funds did receive" with "Funds received"

Page 14036 n.6, Lines 25-26

Delete "; *County of Ventura Tax Collector v. Brawders* (*In re Brawders*), 325 B.R. 405, 414 (9th Cir. BAP 2005)"

Page 14037, Lines 26-27

Replace "If the creditor fails to object" with "If the creditor is notified and fails to object"

The petition for rehearing en banc is denied. *See* Fed R. App. P. 35. No further petitions may be filed and all pending motions are denied.

OPINION

KOZINSKI, Chief Judge:

In our earlier opinion in this case, *Espinosa v. United Student Aid Funds, Inc.*, 530 F.3d 895 (9th Cir. 2008), we remanded to the bankruptcy court for a determination under Rule 60(a) whether exclusion of petitioner's student debt from its discharge order was the result of a clerical error. The bankruptcy court confirmed that:

> the inclusion of paragraph 1(c) in the Discharge Order [which exempted student loan

> obligations from the general discharge] was inserted because of a clerical mistake, because it was the clear intent of the Court, as reflected in the Chapter 13 Plan, as approved by the Court, that all student loan-related obligations were to be discharged if the debtor successfully performed and completed the Plan.

Order of August 20, 2008. We thus finally have presented to us the question that the parties briefed and argued: Whether a debtor may obtain discharge of a student loan by including it in a Chapter 13 plan, if the creditor fails to object after notice of the proposed plan.

Facts

Espinosa filed a Chapter 13 petition and proposed plan that provided for repayment of $13,250 in student loans to United Student Aid Funds, Inc. (Funds). Funds was notified and filed a proof of claim in the amount of $17,832.15.[1] The bankruptcy court eventually confirmed the plan, and the Chapter 13 Trustee mailed Funds a notice advising it that "[t]he amount of the claim filed differs from the amount listed for payment in the plan. Your claim will be paid as listed in the plan." The notice also contained the following warning:

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[1] The difference between these two amounts appears to be interest. *See* n.4 *infra*.

> If an interested party wishes to dispute the above stated treatment of the claim, it is the responsibility of the party to address the dispute. *The claim will be treated as indicated above unless the Trustee receives within 30 days from this mailing, a written request for different treatment.* The request should set forth the specific grounds for alternative treatment and should be filed with the Clerk of the Court, with a copy mailed to the Trustee at [address deleted]. [Emphasis added.]

Funds did not object and Espinosa successfully completed the plan. The bankruptcy court then granted him a discharge.

Three years later, Funds began intercepting Espinosa's income tax refunds to satisfy the unpaid portion of the student loan. Espinosa petitioned the bankruptcy court for an order holding Funds in contempt for violating the discharge injunction. *See* 11 U.S.C. § 524(a)(2). Funds cross-moved for relief from the bankruptcy court's order confirming the plan, on the ground that the order had been entered in violation of Funds's rights under the Bankruptcy Code and Rules.

This is the nub of Funds's argument: To initiate bankruptcy proceedings, a Chapter 13 debtor must notify creditors by mail of the deadline for filing objections and the date of the confirmation hearing. Fed. R. Bankr. P. 2002(b). Espinosa did this. However, student loans may not be discharged under Chapter 13 unless the debtor can show "undue hardship," 11

U.S.C. § 523(a)(8), and such a showing can only be made in an adversary proceeding. *See* Fed. R. Bankr. P. 7001(6). To initiate an adversary, the debtor must file a complaint, *id.* 7003, which must be served on the student loan creditor along with a summons, *id.* 7004. Espinosa didn't do this. Instead Espinosa simply listed the student debt in his Chapter 13 plan, which the bankruptcy court confirmed. Espinosa then made the payments specified in the plan, and the bankruptcy court eventually entered a discharge order. Funds based its motion for relief from this order on Espinosa's failure to initiate an adversary and his consequent failure to obtain a judicial determination of undue hardship.

The bankruptcy court rejected Funds's argument. It held that Funds had violated the discharge injunction and ordered Funds to cease all collection activity against Espinosa. It also denied Funds's motion for relief from the confirmed plan, holding that the plan became final when it was confirmed and that Funds should have objected to any procedural defect before confirmation. Funds appealed to the district court, which reversed. According to the district court, Funds was denied due process because it wasn't served with a complaint and summons. Espinosa appeals.

Analysis

Funds makes both a statutory and a constitutional argument for setting aside the confirmed bankruptcy plan. These arguments turn on the fact

that Espinosa didn't obtain a judicial determination of undue hardship.

[1] **1.** *Statutory Argument.* Funds argues that the bankruptcy court should have set aside Espinosa's discharge because Espinosa didn't comply with the additional procedures required by the Bankruptcy Code and Rules to discharge student debt. *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1086 (9th Cir. 1999), which is on all fours with our case, forecloses this argument. As here, the student loan debtor in *Pardee* didn't employ these additional procedures, and the creditor there didn't file any objections to the proposed Chapter 13 plan, which provided that the student loan debt would be discharged. *Id.* at 1084. The bankruptcy court confirmed the plan, and eventually discharged the student loan debt. *Id.* The creditor subsequently argued that the confirmed plan wasn't final under 11 U.S.C. § 1327(a), because the creditor wasn't given the benefit of the additional procedures applicable to the discharge of student loans. *Pardee*, 193 F.3d at 1086. We firmly rejected this argument, following the Tenth Circuit's lead in *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999). In essence, *Pardee* held that a discharge is a final judgment and cannot be set aside or ignored because a party suddenly claims, years later, that the trial court committed an error.

Two circuits have disagreed with *Pardee*, and accepted Funds's statutory argument. *See Educ.*

Credit Mgmt. Corp. v. Mersmann (*In re Mersmann*), 505 F.3d 1033, 1047-49 (10th Cir. 2007) (en banc) (overruling *Andersen*); *Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 154 (2d Cir. 2005). These opinions divine some sort of conflict between the Bankruptcy Code's finality provision, 11 U.S.C. § 1327(a), and those provisions of the Code and Rules that call for an adversary proceeding before a student loan debt may be discharged. We see no such conflict; both provisions can operate fully, within their proper spheres.

The provision giving student loan creditors a right to special procedures comes into play when the case is pending before the bankruptcy court. If a debtor proposes to discharge a student loan debt without invoking the special procedures applicable to such debts, the creditor can object to the plan until the debtor shows undue hardship in an adversary proceeding.

But there are many reasons a student loan creditor might not object to such a Chapter 13 plan. The creditor might, for example, believe that the debtor would be able to make a convincing showing of undue hardship, and thus see no point in wasting the debtor's money, and its own, litigating the issue. Or, the creditor may decide that a Chapter 13 plan presents its best chance of collecting most of the debt, rather than spending years trying to squeeze blood out of a turnip. Or, the creditor may hope that the debtor will make some payments on the plan but

ultimately fail to complete it, in which case the creditor will have collected a portion of the debt and still be free to collect the rest later.[2] Or, the creditor may overlook the notice or fail to understand its legal implications.

[2] Regardless, when the creditor is served with notice of the proposed plan, it has a full and fair opportunity to insist on the special procedures available to student loan creditors by objecting to the plan on the ground that there has been no undue hardship finding. Rights may, of course, be waived or forfeited, if not raised in a timely fashion. This doesn't mean that these rights are ignored, or that a judgment that is entered after a party fails to assert them conflicts with the statutory scheme or is somehow invalid.

[3] The Bankruptcy Code's finality provision comes into play much later in the process, after the

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[2] This is not an idle hope; an estimated two-thirds of Chapter 13 plans ultimately fail. Scott F. Norberg & Andrew J. Velky, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 Creighton L. Rev. 473, 509 n.74 (2006) ("[D]ata . . . show a continuation of the [Chapter 13 plan] failure rate at about two-thirds.") (citing Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 Am. Bankr. L.J. 461, 474-75 (1997)); National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* 233 (1997), *available at* http://govinfo.library.unt.edu/nbrc/report/08consum.pdf ("For more than a decade, two-thirds of all Chapter 13 plans have failed before the debtor completes payments, and sometimes before unsecured creditors have received anything at all.").

bankruptcy proceedings come to an end. A bankruptcy discharge order is a final judgment and, even without the special protection of section 1327(a), a final judgment cannot be ignored or set aside just because it was the result of an error. Errors committed during the course of litigation must be corrected by way of a timely appeal. We have therefore "recognized the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions." *Pardee,* 193 F.3d at 1086 (citing *Trulis v. Barton,* 107 F.3d 685 (9th Cir. 1995), *Lawrence Tractor Co. v. Gregory* (*In re Gregory*), 705 F.2d 1118 (9th Cir. 1983), and numerous other cases from across the country). Were the rule otherwise, no judgment would ever be conclusive, as a party aggrieved by it could endlessly re-litigate errors supposedly committed by the trial court.

[4] After a judgment (including a discharge) is finalized, and the time for appeal has run, the judgment can only be reconsidered in the limited circumstances provided by Rule 60(b). *Mersmann* and *Whelton* pay scant attention to 60(b) or the caselaw thereunder, which strictly cabins the circumstances under which a judgment can be reopened after it becomes final. *See, e.g., Gaydos v. Guidant Corp.* (*In re Guidant Corp. Implantable Defibrillators Products Liability Litig.*), 496 F.3d 863, 866 (8th Cir. 2007) ("Rule 60(b) authorizes relief in only the most exceptional of cases."); *United States v. Hartwell,* 448 F.3d 707, 722 (4th Cir. 2004) ("[W]hen deciding whether an

order is 'void' under . . . Rule 60(b)(4) for lack of subject matter jurisdiction, courts must look for the rare instance of a clear usurpation of power."); *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007) ("Rule 60(b)(6) should be only sparingly used and may not be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.") (internal quotation marks omitted). Instead, both circuits elide the requirements of 60(b) by treating this as a question of res judicata. *Whelton*, 432 F.3d at 155; *Mersmann*, 505 F.3d at 1049-50.[3]

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[3] *Mersmann* also has what it calls a statutory argument, 505 F.3d at 1047-49, but this passage in the opinion proves nothing more than that the order confirming the plan and the subsequent discharge probably were erroneous and might have been successfully appealed. The court doesn't explain what difference this makes when dealing with a judgment that long ago became final. Even an incorrect judgment is binding, unless and until it is re-opened and modified. This portion of the *Mersmann* opinion thus carries no independent force because it proves something that is both obvious and beside the point.

Whelton appears to have been misled by a stray remark in one of our opinions, *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004), to the effect that "the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding." This statement was correct in the circumstances presented in *Enewally*, where "the bankruptcy court specifically reserved the question at issue [during plan confirmation] because it had been raised via an adversary proceeding." *Id.* It is true, of course, that a plan can have no preclusive effect on matters that have been specifically reserved for resolution by way of an ongoing adversary proceeding. We had no occasion in *Enewally* to consider the situation where there is no adversary and the case is resolved entirely by

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[5] This analysis is wrong on two counts. First, what we have here is not a question of res judicata – giving the judgment in the bankruptcy case preclusive effect in another case. The debtor here – like those in *Mersmann* and *Whelton* – sought to reopen the original case in order to enforce the discharge injunction, which came into force by operation of law upon entry of the discharge. A discharge injunction does not operate by way of res judicata; it is, rather, an equitable remedy precluding the creditor, on pain of contempt, from taking *any* actions to enforce the discharged debt. *See* 2 Collier Bankruptcy Manual (3d rev. ed.) ¶ 524.02[2][c] ("Civil contempt is the normal sanction for violations of the discharge injunction.") (footnote omitted); *id.* ¶ 524.02[2] (discharge "provides for a broad injunction against not only legal proceedings, but also any other acts to collect a discharged debt as a personal liability of the debtor"). This includes garnishments, attachments, self-help and all other means of collection – not merely the filing of another lawsuit. 11 U.S.C. § 524(a)(2); 2 Collier Bankruptcy Manual (3d rev. ed.) ¶ 524.02[2]. A discharge judgment could also have res judicata effect, if the creditor were to try to enforce the debt by bringing a post-discharge lawsuit, but the discharge injunction prevents him from even commencing the

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confirmation of the plan. Anything *Enewally* has to say as to matters not presented in that case is, in any event, dicta and thus not binding on us. Reading *Enewally* broadly to speak to that hypothetical situation would also bring it into conflict with *Pardee*, which addresses precisely this issue.

second suit where the res judicata issue could be litigated. There was no second lawsuit in our case, nor (insofar as we can tell) in *Mersmann* and *Whelton*. Res judicata thus has no application to a case like ours, or those considered by the Second and Tenth Circuits.

Even if res judicata *were* the relevant doctrine, neither *Mersmann* nor *Whelton* offer any persuasive reasons why the discharge order here should be denied full preclusive effect. Both cases seem to go off on the theory that the student loan debt couldn't be discharged by the Chapter 13 plan because the creditor was not served with a complaint and summons, as required for the commencement of an adversary proceeding. *Whelton,* 432 F.3d at 155; *Mersmann,* 505 F.2d at 1049-50. But the creditor in our case (as in those other cases) did get proper notice of the proposed Chapter 13 plan, and so knew perfectly well that if the plan were approved and satisfied, the debtor would be granted a discharge of the student debt listed in the plan.[4] Had the creditor wanted to

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[4] In our case, the creditor was served with the "Notice of Commencement of Case Under Chapter 13 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates." Attached to this notice was a copy of the proposed Chapter 13 plan, which carried the following prominent warning: "WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." There follows a detailed description of debtor's assets and liabilities, a payment schedule and a great deal of other pertinent information. One section of the plan is titled "Education Loan(s)" and lists all of Funds's loans, for a total of

(Continued on following page)

insist on an adversary, it could have objected to the Chapter 13 plan on the ground that there was no judicial finding of undue hardship. Had Funds so objected, the bankruptcy court would have been required to disapprove the plan and Espinosa would have been put to the hard choice of commencing an adversary or abandoning Chapter 13. But Funds didn't object to the plan and didn't appeal the order

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$13,250. The plan specifies that this amount should be paid in full, followed by a paragraph stating as follows:

> The amounts claimed by the United Student Loan Aid Funds, Inc., *et. al.* for capitalized interest, penalties, and fees shall not be paid for the reasons that the same are penalties and not provided for in the loan agreement between the Debtor and the lender.

The subsequent paragraph provides as follows: "Any amounts or claims for student loans unpaid by this Plan shall be discharged." Paragraph 6 of the plan is titled "OBJECTIONS" and provides as follows: "Objections, by any creditor, must be filed seven (7) days prior to the hearing on Confirmation of Plan along with a copy to the Trustee and Debtor's counsel." Paragraph 7 is titled "PROOF OF CLAIM" and states as follows:

> As a creditor you must file your proof of claim in order to get paid the amounts provided for in this plan. If you do not file your proof of claim by the deadline date you will not receive anything even if the Plan provides for payment. The deadline for filing proofs of claim is set forth in the Notice Of Commencement [Of] Case Under Chapter 13 Of The Bankruptcy Code, Meeting of Creditors, And Fixing of Dates which you have received from the Clerk of the United States Bankruptcy Court.

As noted, Funds filed a proof of claim, but no objection to the plan.

confirming the plan, as it well could have. *See In re Gregory,* 705 F.2d at 1121. Instead, it accepted the payments made by the debtor during the plan's life and then acted as if the whole thing never happened. *See* p. 1198 *supra.*

It makes a mockery of the English language and common sense to say that Funds wasn't given notice, or was somehow ambushed or taken advantage of. The only thing the creditor was not told is that it could insist on an adversary proceeding and a judicial determination of undue hardship. But that's less a matter of notice and more of a tutorial as to what rights the creditor has under the Bankruptcy Code – a long-form *Miranda* warning for bankers. If that were the standard for adequate notice, every notification under the Bankruptcy Code would have to be accompanied by Collier's Treatise, lest the creditor overlook some rights it might have under the Code.

Mersmann recognizes this problem when it states (without citation) that this kind of notice is somehow different from ordinary notices because it "goes to the heart of the creditor's notice of the bankruptcy plan itself." 505 F.3d at 1050. But it's not clear why letting the creditor know, in plain terms, that its rights will be impaired by the proposed plan – and then leaving it up to the creditor and his lawyers to figure out what objections or remedies are available – doesn't satisfy the Tenth Circuit's "heart of the . . . notice" standard. After all, we aren't talking here about destitute widows and orphans, or people who don't speak

English or can't afford a lawyer. The creditors in such cases are huge enterprises whose business it is to administer the very kinds of debts here in question. If this kind of notice to sophisticated parties who have ample resources to protect their rights is inadequate for purposes of res judicata, then the concept of notice has no meaning and res judicata is a fairy tale.

While we are bound by *Pardee,* we have taken a close look at the contrary holdings of our sister circuits in order to determine whether we have strayed off course, in which case we would call for rehearing en banc to correct our caselaw. But we don't find the reasoning of the two other circuits persuasive. Rather, we agree with Judge Lundin that "*Pardee* and *Andersen* stand soundly for the better-reasoned principle that notice of how the Chapter 13 plan affects creditors' rights is all that the Constitution, the Bankruptcy Code and the Bankruptcy Rules require to bind creditors to the provisions of a confirmed plan under § 1327(a)." Keith M. Lundin, *Chapter 13 Bankruptcy* § 229.1 (3d ed. 2000 & Supp. 2004).

Funds also relies heavily on *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440 (2004). But as Judge Lundin explains, *Hood* is at best unhelpful and more likely undermines Funds's argument:

> Admittedly, sovereign immunity, not the preclusive effect of confirmation, was the issue in *Hood;* but the point remains that the Supreme Court recognized in *Hood* that an

> adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to adjudication of the discharge of a student loan. Many of the cases taking issue with *Pardee* and *Andersen* declare the contrary view that the discharge of a student loan by any procedure other than adversary proceeding violates due process. This premise is not consistent with *Hood*.

Keith M. Lundin, *Chapter 13 Bankruptcy* § 346.1 (3d ed. 2000 & Supp. 2004). Seeing no reason to change course, we continue to follow *Pardee*.

2. Funds also argues that the discharge order is void because Funds was denied due process, as it was never served with a complaint and summons as required by Fed. R. Bankr. P. 7004. Three circuits have held, like the district court below, that a student loan debtor's failure to commence an adversary proceeding by serving the student loan creditor with a complaint and summons, denies the creditor due process. *Ruehle v. Educ. Credit Mgmt. Corp.* (*In re Ruehle*), 412 F.3d 679, 682-83 (6th Cir. 2005); *In re Hanson*, 397 F.3d 482, 486 (7th Cir. 2005); *Banks v. Sallie Mae Servicing Corp.* (*In re Banks*), 299 F.3d 296, 302-03 (4th Cir. 2002). Because we did not consider this argument in *Pardee* or any other case, circuit law does not preclude us from addressing it.

We begin our analysis with Rule 60(b), the gateway for setting aside any final judgment. Because the judgment is more than a year old, the first three

subsections of 60(b) cannot be relied on, Fed. R. Civ. P. 60(c)(1), and are inapplicable in any event. Subsection 5, dealing with satisfied judgments, is similarly inapplicable. Subsections 4 and 6, however, are possibilities: If the opposing party is given no notice at all of the lawsuit, or notice is so inadequate as to violate due process, any judgment entered against that party would be void (subsection 4), and such constitutionally deficient service would certainly be a just reason for relief from the judgment (subsection 6). *See, e.g., Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc.* (*In re Ctr. Wholesale, Inc.*), 759 F.2d 1440, 1448-51 (9th Cir. 1985); *Baldwin v. Credit Based Asset Servicing and Securitization,* 516 F.3d 734, 737-38 (8th Cir. 2008).

[6] The standard for what amounts to constitutionally adequate notice, however, is fairly low; it's "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). *In re Gregory* rejected an argument that Chapter 13 notice of a proposed plan is constitutionally defective because it does not apprise each creditor of how its own claim will be disposed of by the plan:

> When the holder of a large, unsecured claim such as Lawrence receives any notice from the bankruptcy court that its debtor has initiated bankruptcy proceedings, *it is under*

> *constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril.* "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry may have led. When a person has sufficient information to lead him to a fact, he shall be deemed to be conversant of it." *D.C. Transit System, Inc. v. United States,* 531 F.Supp. 808, 812 (D.D.C. 1982). (citations omitted.) The notice included the names of the bankruptcy judge, the trustee, and Gregory's attorney, and presumably any of them could have helped Lawrence obtain a copy of the plan or informed it as to the plan's proposal concerning its claim. If Lawrence had made any inquiry following receipt of the notice, it would have discovered that it needed to act to protect its interest.

705 F.2d at 1123 (emphasis added).

[7] The reasoning of *In re Gregory* is controlling here, not only because it is law of the circuit, but because it's entirely consistent with *Mullane* and the more than a half century of due process caselaw that follows it. If a party is adequately notified of a pending lawsuit, it is deemed to know the consequences of responding or failing to respond, even if gaining actual knowledge requires inquiry into court files, hiring a lawyer or conducting legal research. Indeed, it would be virtually impossible to operate a legal system if due process required more notice than that.

[8] As noted, Funds here did receive actual notice of Espinosa's bankruptcy case; we know this both from documents in the record, which show receipt, and from the fact that Funds presented a proof of claim. Because "due process does not require actual notice," *Jones v. Flowers,* 547 U.S. 220, 225 (2006), it follows a fortiori that actual notice satisfies due process. We find the argument that the Constitution requires something *more* than actual notice strained to the point of the bizarre.

The notices Funds received also warned of the consequences of failing to object – which is more than due process requires. A creditor receiving such notice would have known that its debt could be adversely affected by the proposed plan, and that it needed to file an objection if it wished to avoid that result.[5] Funds raised no such objection, nor did it appeal the order confirming the plan. We cannot say that Funds was taken by surprise or was denied due process. Quite the contrary: Funds appears to have been a willing participant, perfectly happy to receive the benefits of the Chapter 13 plan, but unwilling to

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[5] Even after the bankruptcy court confirmed the plan, Funds had an opportunity to dispute it. The notice attached to the proposed plan specifically advised that the "amount of the claim [Funds] filed differs from the amount listed for payment in [Espinosa's] plan," and warned Funds that its "claim will be paid as listed in the plan" unless the Chapter 13 Trustee received notice within 30 days from Funds that it "wishes to dispute the above stated treatment of the claim." Funds did not object.

suffer the consequences of its failure to file an objection.

The three circuits that have held that the creditor is denied due process in circumstances such as these appear to have a different understanding of what due process requires. As best we can follow their reasoning, it is that a creditor who is entitled to heightened notice by statute is also entitled to such heightened notice as a matter of due process. This footnote from *In re Banks,* the first circuit case to adopt this novel approach, tries to explain this rationale: "We do not today hold that the Constitution in itself requires a summons and service of process to discharge student loan debt. We merely confirm that where the Bankruptcy Code and Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect." 299 F.3d at 303 n.4. *Accord In re Hanson,* 397 F.3d at 486 ("student loan creditors justifiably rely on the explicit notice provisions of the Bankruptcy Code and Rules and have no reason to act until the service of a summons for an adversary proceeding apprises them that their property rights may be affected."); *In re Ruehle,* 412 F.3d at 683. The Seventh Circuit in *Hanson* goes so far as to say that "Hanson's failure to serve [the creditor] with a summons and an adversary proceeding complaint effectively denied [the creditor] the opportunity of presenting an objection prior to the

adjudication of its rights." 397 F.3d at 486 (citing *Mullane*, 339 U.S. at 313-14).

We do not find this reasoning persuasive and thus have no occasion to call for rehearing en banc to consider overruling *In re Gregory*. To begin with, we find it both wrong and dangerous to hold that the standard for what amounts to constitutionally adequate notice can be changed by legislation. The constitutional standard, as we understand it, requires that a party affected by the litigation obtain sufficient notice so that it is able to take steps to defend its interests. Congress can, of course, give rights to additional notice, but we find it difficult to see how this can affect the floor provided by due process – either to increase or diminish it.

[9] Even if Congress could affect the constitutional standard, it didn't do so here: Congress made it quite clear that a creditor need only get ordinary notice of a Chapter 13 plan to be bound by its terms. That Congress provided heightened notice requirements for an adversary proceeding, which didn't take place here, is of no consequence. Had there been an adversary proceeding, and had the creditor not been served with a complaint and summons, the creditor may then have been free to ignore the adversary until it was properly served. But here (and in the similar cases from other courts) there was no adversary proceeding; the creditor's rights were cut off by the Chapter 13 plan, precisely as specified in the notice

the creditor did receive. We reject the idea that a creditor who is in the business of administering student loans has a *constitutional* right to ignore a properly served notice that clearly specifies that its debt will be discharged on successful completion of the plan.[6]

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[6] Our Bankruptcy Appellate Panel's opinion in *In re Repp* suffers from the same defect in reasoning. The opinion there bemoans "an unfair Catch-22" and even a "double Catch-22" that the student loan creditor supposedly confronts. *Educ. Credit Mgmt. Corp. v. Repp* (*In re Repp*), 307 B.R. 144, 153 (9th Cir. BAP 2004). We don't see any Catch-22: A creditor who wants to force the debtor to follow the statutory procedure for discharging student debt need only object to the proposed plan on the ground that there has not been a proper undue hardship finding. The debtor must then procure such a finding by bringing an adversary proceeding and serving the creditor with a complaint and summons. As Judge Ryan points out in his well-reasoned dissent, the creditor in *Repp* (like the one in our case) was not subjected to any kind of unfairness:

> It should be pointed out that ECMC was a creditor, had filed a claim, and knew or should have known that its rights could be affected by the plan. It cannot stick its head in the sand, ignore the plan terms, and later claim foul play because it is adversely impacted by the plan. Due process does not place substance over form. Here, the substance is that ECMC had actual knowledge of the plan terms and chose to default. It cannot now seek a second bite of the apple by way of a due process argument.

Id. at 156. The *Repp* majority would have done well to adopt the view of its dissenting colleague and follow circuit law as announced by *Pardee* and *In re Gregory*. *In re Repp* and cases following it are overruled. *See, e.g., Sallie Mae Servicing Corp. v. Ransom* (*In re Ransom*), 336 B.R. 790, 797-98 (9th Cir. BAP 2005).

In short, we find the due process argument even less persuasive than the statutory argument, despite the eagerness of some of our sister circuits and other courts to adopt it. What appears to be going on is that courts are re-casting what may be a simple statutory violation as a denial of due process so that they can set aside judgments with which they're unhappy. This approach is not consistent with the theory of objective judging, which calls for us to apply the law fairly to the facts and let the chips fall where they ~~may~~. We see no reason to reconsider the approach we adopted in *In re Gregory,* which we believe is fully consistent with the Supreme Court's teachings in *Mullane,* and with fairness and justice as well.

Conclusion

It is apparent that a number of courts in our circuit, including the district court below, are uncomfortable with the practice of some Chapter 13 debtors to seek to discharge their student debts by working them into their Chapter 13 plans. Some bankruptcy judges have announced that they won't confirm plans that seek to discharge student loan debts without an adversary proceeding, even when the creditor fails to object to the plan. *See, e.g., Patton v. U.S. Dep't of Educ. (In re Patton),* 261 B.R. 44, 48 (Bankr. E.D. Wash. 2001); *In re Webber,* 251 B.R. 554, 557-58 (Bankr. D. Ariz. 2000). In fact, one of these opinions has suggested that inclusion of a "non-dischargeable"

debt in a Chapter 13 plan "may be the subject of sanctions." *In re Patton,* 261 B.R. at 48.

[10] For reasons explained above, we view matters quite differently. Our long-standing circuit law holds that student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, after receiving notice of the proposed plan, *Pardee,* 193 F.3d at 1086, and that such notice is not constitutionally inadequate. *In re Gregory,* 705 F.2d at 1123. We find it highly unlikely that a creditor whose business it is to administer student loans will be misled by the customary bankruptcy procedures or somehow be bamboozled into giving up its rights by crafty student debtors. If the creditor is notified and fails to object, it is doubtless the result of a careful calculation that this course is the one most likely to yield repayment of at least a portion of the debt. In such circumstances, bankruptcy courts have no business standing in the way. Cases such as *In re Webber* and *In re Patton* are, to that extent, overruled.

[11] The district court's judgment reversing the bankruptcy court is reversed. The case is remanded to the bankruptcy court for reinstatement of the order enforcing the discharge injunction and for a determination whether the creditor acted willfully in violating the injunction under the standard we announced

in *ZiLOG, Inc. v. Corning (In Re ZiLOG, Inc.)*, 450 F.3d 996 (9th Cir. 2006).[7]

REVERSED and REMANDED.

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[7] As we held in *Zilog*:

> A party who knowingly violates the discharge injunction can be held in contempt under section 105(a) of the bankruptcy code. *See In re Bennett*, 298 F.3d at 1069; *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002) (holding that civil contempt is an appropriate remedy for a willful violation of section 524's discharge injunction). In *Bennett*, we noted that the party seeking contempt sanctions has the burden of proving, by clear and convincing evidence, that the sanctions are justified. We cited with approval the standard adopted by the Eleventh Circuit for violation of the discharge injunction: "[T]he movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction."

450 F.3d at 1007 (citing *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002) (citing *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996)). That the creditor may have believed that the discharge was inappropriately entered, or that it could be set aside under Rule 60(b), is of no consequence. A creditor is not free to violate the discharge injunction because it has doubts as to the validity of the discharge. If the creditor believes the discharge is defective, it may petition the bankruptcy court to reopen and set aside the judgment under Rule 60(b), but it may not commence collection proceedings unless and until the court grants such relief. If the bankruptcy court finds that the creditor here willfully violated the injunction, it shall, at the very least, impose sanctions to the extent necessary to make Espinosa whole. *See* 2 Collier Bankruptcy Manual (3d rev. ed.) ¶ 524.02[2][c] ("In cases in which the discharge injunction was violated willfully, courts have awarded debtors actual damages, punitive damages and attorney's fees.") (footnote omitted).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANCISCO J. ESPINOSA, *Plaintiff-Appellant*, v. UNITED STUDENT AID FUNDS, INC., *Defendant-Appellee*.	No. 06-16421 D.C. No. CV-04-00447-RCC OPINION

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted April 16, 2008
Submission Vacated June 24, 2008
Resubmitted August 29, 2008
San Francisco, California

Filed October 2, 2008

Before: Alex Kozinski, Chief Judge,
A. Wallace Tashima and
N. Randy Smith, Circuit Judges.

Opinion by Chief Judge Kozinski

COUNSEL

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Madeleine C. Wanslee, Gust Rosenfeld P.L.C., Phoenix, Arizona, for the defendant-appellee.

OPINION

KOZINSKI, Chief Judge:

In our earlier opinion in this case, *Espinosa v. United Student Aid Funds, Inc.*, 530 F.3d 895 (9th Cir. 2008), we remanded to the bankruptcy court for a determination under Rule 60(a) whether exclusion of petitioner's student debt from its discharge order was the result of a clerical error. The bankruptcy court confirmed that:

> the inclusion of paragraph 1(c) in the Discharge Order [which exempted student loan obligations from the general discharge] was inserted because of a clerical mistake, because it was the clear intent of the Court, as reflected in the Chapter 13 Plan, as approved by the Court, that all student loan-related obligations were to be discharged if the debtor successfully performed and completed the Plan.

Order of August 20, 2008. We thus finally have presented to us the question that the parties briefed and argued: Whether a debtor may obtain discharge of a student loan by including it in a Chapter 13 plan, if the creditor fails to object after notice of the proposed plan.

Facts

Espinosa filed a Chapter 13 petition and proposed plan that provided for repayment of $13,250 in student loans to United Student Aid Funds, Inc. (Funds). Funds was notified and filed a proof of claim in the amount of $17,832.15.[1] The bankruptcy court eventually confirmed the plan, and the Chapter 13 Trustee mailed Funds a notice advising it that "[t]he amount of the claim filed differs from the amount listed for payment in the plan. Your claim will be paid as listed in the plan." The notice also contained the following warning:

> If an interested party wishes to dispute the above stated treatment of the claim, it is the responsibility of the party to address the dispute. *The claim will be treated as indicated above unless the Trustee receives within 30 days from this mailing, a written request for different treatment.* The request should set forth the specific grounds for alternative treatment and should be filed with the Clerk of the Court, with a copy mailed to the Trustee at [address deleted]. [Emphasis added.]

Funds did not object and Espinosa successfully completed the plan. The bankruptcy court then granted him a discharge.

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[1] The difference between these two amounts appears to be interest. *See* n.4 *infra*.

Three years later, Funds began intercepting Espinosa's income tax refunds to satisfy the unpaid portion of the student loan. Espinosa petitioned the bankruptcy court for an order holding Funds in contempt for violating the discharge injunction. *See* 11 U.S.C. § 524(a)(2). Funds cross-moved for relief from the bankruptcy court's order confirming the plan, on the ground that the order had been entered in violation of Funds's rights under the Bankruptcy Code and Rules.

This is the nub of Funds's argument: To initiate bankruptcy proceedings, a Chapter 13 debtor must notify creditors by mail of the deadline for filing objections and the date of the confirmation hearing. Fed. R. Bankr. P. 2002(b). Espinosa did this. However, student loans may not be discharged under Chapter 13 unless the debtor can show "undue hardship," 11 U.S.C. § 523(a)(8), and such a showing can only be made in an adversary proceeding. *See* Fed. R. Bankr. P. 7001(6). To initiate an adversary, the debtor must file a complaint, *id.* 7003, which must be served on the student loan creditor along with a summons, *id.* 7004. Espinosa didn't do this. Instead Espinosa simply listed the student debt in his Chapter 13 plan, which the bankruptcy court confirmed. Espinosa then made the payments specified in the plan, and the bankruptcy court eventually entered a discharge order. Funds based its motion for relief from this order on Espinosa's failure to initiate an adversary and his consequent failure to obtain a judicial determination of undue hardship.

The bankruptcy court rejected Funds's argument. It held that Funds had violated the discharge injunction and ordered Funds to cease all collection activity against Espinosa. It also denied Funds's motion for relief from the confirmed plan, holding that the plan became final when it was confirmed and that Funds should have objected to any procedural defect before confirmation. Funds appealed to the district court, which reversed. According to the district court, Funds was denied due process because it wasn't served with a complaint and summons. Espinosa appeals.

Analysis

Funds makes both a statutory and a constitutional argument for setting aside the confirmed bankruptcy plan. These arguments turn on the fact that Espinosa didn't obtain a judicial determination of undue hardship.

[1] **1.** *Statutory Argument.* Funds argues that the bankruptcy court should have set aside Espinosa's discharge because Espinosa didn't comply with the additional procedures required by the Bankruptcy Code and Rules to discharge student debt. *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1086 (9th Cir. 1999), which is on all fours with our case, forecloses this argument. As here, the student loan debtor in *Pardee* didn't employ these additional procedures, and the creditor there didn't file any objections to the proposed Chapter 13 plan, which provided that the student loan debt would be

discharged. *Id.* at 1084. The bankruptcy court confirmed the plan, and eventually discharged the student loan debt. *Id.* The creditor subsequently argued that the confirmed plan wasn't final under 11 U.S.C. § 1327(a), because the creditor wasn't given the benefit of the additional procedures applicable to the discharge of student loans. *Pardee,* 193 F.3d at 1086. We firmly rejected this argument, following the Tenth Circuit's lead in *Andersen v. UNIPAC-NEBHELP* (*In re Andersen*), 179 F.3d 1253 (10th Cir. 1999). In essence, *Pardee* held that a discharge is a final judgment and cannot be set aside or ignored because a party suddenly claims, years later, that the trial court committed an error.

Two circuits have disagreed with *Pardee,* and accepted Funds's statutory argument. *See Educ. Credit Mgmt. Corp. v. Mersmann* (*In re Mersmann*), 505 F.3d 1033, 1047-49 (10th Cir. 2007) (en banc) (overruling *Andersen*); *Whelton v. Educ. Credit Mgmt. Corp.,* 432 F.3d 150, 154 (2d Cir. 2005). These opinions divine some sort of conflict between the Bankruptcy Code's finality provision, 11 U.S.C. § 1327(a), and those provisions of the Code and Rules that call for an adversary proceeding before a student loan debt may be discharged. We see no such conflict; both provisions can operate fully, within their proper spheres.

The provision giving student loan creditors a right to special procedures comes into play when the case is pending before the bankruptcy court. If a debtor proposes to discharge a student loan debt

without invoking the special procedures applicable to such debts, the creditor can object to the plan until the debtor shows undue hardship in an adversary proceeding.

But there are many reasons a student loan creditor might not object to such a Chapter 13 plan. The creditor might, for example, believe that the debtor would be able to make a convincing showing of undue hardship, and thus see no point in wasting the debtor's money, and its own, litigating the issue. Or, the creditor may decide that a Chapter 13 plan presents its best chance of collecting most of the debt, rather than spending years trying to squeeze blood out of a turnip. Or, the creditor may hope that the debtor will make some payments on the plan but ultimately fail to complete it, in which case the creditor will have collected a portion of the debt and still be free to collect the rest later.[2] Or, the creditor may

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[2] This is not an idle hope; an estimated two-thirds of Chapter 13 plans ultimately fail. Scott F. Norberg & Andrew J. Velky, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 Creighton L. Rev. 473, 509 n.74 (2006) ("[D]ata . . . show a continuation of the [Chapter 13 plan] failure rate at about two-thirds.") (citing Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 Am. Bankr. L.J. 461, 474-75 (1997)); National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* 233 (1997), *available at* http://govinfo.library.unt.edu/nbrc/report/08consum.pdf ("For more than a decade, two-thirds of all Chapter 13 plans have failed before the debtor completes payments, and sometimes before unsecured creditors have received anything at all.").

overlook the notice or fail to understand its legal implications.

[2] Regardless, when the creditor is served with notice of the proposed plan, it has a full and fair opportunity to insist on the special procedures available to student loan creditors by objecting to the plan on the ground that there has been no undue hardship finding. Rights may, of course, be waived or forfeited, if not raised in a timely fashion. This doesn't mean that these rights are ignored, or that a judgment that is entered after a party fails to assert them conflicts with the statutory scheme or is somehow invalid.

[3] The Bankruptcy Code's finality provision comes into play much later in the process, after the bankruptcy proceedings come to an end. A bankruptcy discharge order is a final judgment and, even without the special protection of section 1327(a), a final judgment cannot be ignored or set aside just because it was the result of an error. Errors committed during the course of litigation must be corrected by way of a timely appeal. We have therefore "recognized the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions." *Pardee,* 193 F.3d at 1086 (citing *Trulis v. Barton,* 107 F.3d 685 (9th Cir. 1995), *Lawrence Tractor Co. v. Gregory* (*In re Gregory*), 705 F.2d 1118 (9th Cir. 1983), and numerous other cases from across the country). Were the rule otherwise, no judgment would ever be conclusive, as a party aggrieved by it could endlessly re-litigate errors supposedly committed by the trial court.

[4] After a judgment (including a discharge) is finalized, and the time for appeal has run, the judgment can only be reconsidered in the limited circumstances provided by Rule 60(b). *Mersmann* and *Whelton* pay scant attention to 60(b) or the caselaw thereunder, which strictly cabins the circumstances under which a judgment can be reopened after it becomes final. *See, e.g., Gaydos v. Guidant Corp.* (*In re Guidant Corp. Implantable Defibrillators Products Liability Litig.*), 496 F.3d 863, 866 (8th Cir. 2007) ("Rule 60(b) authorizes relief in only the most exceptional of cases."); *United States v. Hartwell,* 448 F.3d 707, 722 (4th Cir. 2004) ("[W]hen deciding whether an order is 'void' under . . . Rule 60(b)(4) for lack of subject matter jurisdiction, courts must look for the rare instance of a clear usurpation of power."); *Kramer v. Gates,* 481 F.3d 788, 792 (D.C. Cir. 2007) ("Rule 60(b)(6) should be only sparingly used and may not be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.") (internal quotation marks omitted). Instead, both circuits elide the requirements of 60(b) by treating this as a question of res judicata. *Whelton,* 432 F.3d at 155; *Mersmann,* 505 F.3d at 1049-50.[3]

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[3] *Mersmann* also has what it calls a statutory argument, 505 F.3d at 1047-49, but this passage in the opinion proves nothing more than that the order confirming the plan and the subsequent discharge probably were erroneous and might have been successfully appealed. The court doesn't explain what difference this makes when dealing with a judgment that long ago became final. Even an incorrect judgment is binding, unless

(Continued on following page)

[5] This analysis is wrong on two counts. First, what we have here is not a question of res judicata – giving the judgment in the bankruptcy case preclusive effect in another case. The debtor here – like those in *Mersmann* and *Whelton* – sought to reopen the original case in order to enforce the discharge injunction, which came into force by operation of law upon entry of the discharge. A discharge injunction does not operate by way of res judicata; it is, rather, an equitable remedy precluding the creditor, on pain of contempt, from taking *any* actions to enforce the discharged debt. *See* 2 Collier Bankruptcy Manual (3d rev. ed.) ¶ 524.02[2][c] ("Civil contempt is the

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and until it is re-opened and modified. This portion of the *Mersmann* opinion thus carries no independent force because it proves something that is both obvious and beside the point.

Whelton appears to have been misled by a stray remark in one of our opinions, *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004), to the effect that "the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding." This statement was correct in the circumstances presented in *Enewally*, where "the bankruptcy court specifically reserved the question at issue [during plan confirmation] because it had been raised via an adversary proceeding." *Id.* It is true, of course, that a plan can have no preclusive effect on matters that have been specifically reserved for resolution by way of an ongoing adversary proceeding. We had no occasion in *Enewally* to consider the situation where there is no adversary and the case is resolved entirely by confirmation of the plan. Anything *Enewally* has to say as to matters not presented in that case is, in any event, dicta and thus not binding on us. Reading *Enewally* broadly to speak to that hypothetical situation would also bring it into conflict with *Pardee*, which addresses precisely this issue.

normal sanction for violations of the discharge injunction.") (footnote omitted); *id.* ¶ 524.02[2] (discharge "provides for a broad injunction against not only legal proceedings, but also any other acts to collect a discharged debt as a personal liability of the debtor"). This includes garnishments, attachments, self-help and all other means of collection – not merely the filing of another lawsuit. 11 U.S.C. § 524(a)(2); 2 Collier Bankruptcy Manual (3d rev. ed.) ¶ 524.02[2]. A discharge judgment could also have res judicata effect, if the creditor were to try to enforce the debt by bringing a post-discharge lawsuit, but the discharge injunction prevents him from even commencing the second suit where the res judicata issue could be litigated. There was no second lawsuit in our case, nor (insofar as we can tell) in *Mersmann* and *Whelton*. Res judicata thus has no application to a case like ours, or those considered by the Second and Tenth Circuits.

Even if res judicata *were* the relevant doctrine, neither *Mersmann* nor *Whelton* offer any persuasive reasons why the discharge order here should be denied full preclusive effect. Both cases seem to go off on the theory that the student loan debt couldn't be discharged by the Chapter 13 plan because the creditor was not served with a complaint and summons, as required for the commencement of an adversary proceeding. *Whelton*, 432 F.3d at 155; *Mersmann*, 505 F.2d at 1049-50. But the creditor in our case (as in those other cases) did get proper notice of the proposed Chapter 13 plan, and so knew perfectly well

that if the plan were approved and satisfied, the debtor would be granted a discharge of the student debt listed in the plan.[4] Had the creditor wanted to

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[4] In our case, the creditor was served with the "Notice of Commencement of Case Under Chapter 13 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates." Attached to this notice was a copy of the proposed Chapter 13 plan, which carried the following prominent warning: "WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." There follows a detailed description of debtor's assets and liabilities, a payment schedule and a great deal of other pertinent information. One section of the plan is titled "Education Loan(s)" and lists all of Funds's loans, for a total of $13,250. The plan specifies that this amount should be paid in full, followed by a paragraph stating as follows:

> The amounts claimed by the United Student Loan Aid Funds, Inc., *et. al.* for capitalized interest, penalties, and fees shall not be paid for the reasons that the same are penalties and not provided for in the loan agreement between the Debtor and the lender.

The subsequent paragraph provides as follows: "Any amounts or claims for student loans unpaid by this Plan shall be discharged." Paragraph 6 of the plan is titled "OBJECTIONS" and provides as follows: "Objections, by any creditor, must be filed seven (7) days prior to the hearing on Confirmation of Plan along with a copy to the Trustee and Debtor's counsel." Paragraph 7 is titled "PROOF OF CLAIM" and states as follows:

> As a creditor you must file your proof of claim in order to get paid the amounts provided for in this plan. If you do not file your proof of claim by the deadline date you will not receive anything even if the Plan provides for payment. The deadline for f'ing proofs of claim is set forth in the Notice Of Commencement [Of] Case Under Chapter 13 Of The Bankruptcy Code, Meeting of Creditors, And Fixing of Dates which you have received from the Clerk of the United States Bankruptcy Court.

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insist on an adversary, it could have objected to the Chapter 13 plan on the ground that there was no judicial finding of undue hardship. Had Funds so objected, the bankruptcy court would have been required to disapprove the plan and Espinosa would have been put to the hard choice of commencing an adversary or abandoning Chapter 13. But Funds didn't object to the plan and didn't appeal the order confirming the plan, as it well could have. *See In re Gregory,* 705 F.2d at 1121. Instead, it accepted the payments made by the debtor during the plan's life and then acted as if the whole thing never happened. *See* p. 1198 *supra.*

It makes a mockery of the English language and common sense to say that Funds wasn't given notice, or was somehow ambushed or taken advantage of. The only thing the creditor was not told is that it could insist on an adversary proceeding and a judicial determination of undue hardship. But that's less a matter of notice and more of a tutorial as to what rights the creditor has under the Bankruptcy Code – a long-form *Miranda* warning for bankers. If that were the standard for adequate notice, every notification under the Bankruptcy Code would have to be accompanied by Collier's Treatise, lest the creditor overlook some rights it might have under the Code.

As noted, Funds filed a proof of claim, but no objection to the plan.

Mersmann recognizes this problem when it states (without citation) that this kind of notice is somehow different from ordinary notices because it "goes to the heart of the creditor's notice of the bankruptcy plan itself." 505 F.3d at 1050. But it's not clear why letting the creditor know, in plain terms, that its rights will be impaired by the proposed plan – and then leaving it up to the creditor and his lawyers to figure out what objections or remedies are available – doesn't satisfy the Tenth Circuit's "heart of the . . . notice" standard. After all, we aren't talking here about destitute widows and orphans, or people who don't speak English or can't afford a lawyer. The creditors in such cases are huge enterprises whose business it is to administer the very kinds of debts here in question. If this kind of notice to sophisticated parties who have ample resources to protect their rights is inadequate for purposes of res judicata, then the concept of notice has no meaning and res judicata is a fairy tale.

While we are bound by *Pardee,* we have taken a close look at the contrary holdings of our sister circuits in order to determine whether we have strayed off course, in which case we would call for rehearing en banc to correct our caselaw. But we don't find the reasoning of the two other circuits persuasive. Seeing no reason to change course, we continue to follow *Pardee.*

2. Funds also argues that the discharge order is void because Funds was denied due process, as it was never served with a complaint and summons as

required by Fed. R. Bankr. P. 7004. Three circuits have held, like the district court below, that a student loan debtor's failure to commence an adversary proceeding by serving the student loan creditor with a complaint and summons, denies the creditor due process. *Ruehle v. Educ. Credit Mgmt. Corp.* (*In re Ruehle*), 412 F.3d 679, 682-83 (6th Cir. 2005); *In re Hanson,* 397 F.3d 482, 486 (7th Cir. 2005); *Banks v. Sallie Mae Servicing Corp.* (*In re Banks*), 299 F.3d 296, 302-03 (4th Cir. 2002). Because we did not consider this argument in *Pardee* or any other case, circuit law does not preclude us from addressing it.

We begin our analysis with Rule 60(b), the gateway for setting aside any final judgment. Because the judgment is more than a year old, the first three subsections of 60(b) cannot be relied on, Fed. R. Civ. P. 60(c)(1), and are inapplicable in any event. Subsection 5, dealing with satisfied judgments, is similarly inapplicable. Subsections 4 and 6, however, are possibilities: If the opposing party is given no notice at all of the lawsuit, or notice is so inadequate as to violate due process, any judgment entered against that party would be void (subsection 4), and such constitutionally deficient service would certainly be a just reason for relief from the judgment (subsection 6). *See, e.g., Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc.* (*In re Ctr. Wholesale, Inc.*), 759 F.2d 1440, 1448-51 (9th Cir. 1985); *Baldwin v. Credit Based Asset Servicing and Securitization,* 516 F.3d 734, 737-38 (8th Cir. 2008).

[6] The standard for what amounts to constitutionally adequate notice, however, is fairly low; it's "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *In re Gregory* rejected an argument that Chapter 13 notice of a proposed plan is constitutionally defective because it does not apprise each creditor of how its own claim will be disposed of by the plan:

> When the holder of a large, unsecured claim such as Lawrence receives any notice from the bankruptcy court that its debtor has initiated bankruptcy proceedings, *it is under constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril.* "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry may have led. When a person has sufficient information to lead him to a fact, he shall be deemed to be conversant of it." *D.C. Transit System, Inc. v. United States*, 531 F.Supp. 808, 812 (D.D.C. 1982). (citations omitted.) The notice included the names of the bankruptcy judge, the trustee, and Gregory's attorney, and presumably any of them could have helped Lawrence obtain a copy of the plan or informed it as to the plan's proposal concerning its claim. If Lawrence had made any inquiry following receipt

> of the notice, it would have discovered that it needed to act to protect its interest.

705 F.2d at 1123 (emphasis added).

[7] The reasoning of *In re Gregory* is controlling here, not only because it is law of the circuit, but because it's entirely consistent with *Mullane* and the more than a half century of due process caselaw that follows it. If a party is adequately notified of a pending lawsuit, it is deemed to know the consequences of responding or failing to respond, even if gaining actual knowledge requires inquiry into court files, hiring a lawyer or conducting legal research. Indeed, it would be virtually impossible to operate a legal system if due process required more notice than that.

[8] As noted, Funds here did receive actual notice of Espinosa's bankruptcy case; we know this both from documents in the record, which show receipt, and from the fact that Funds presented a proof of claim. The notices Funds did receive also warned of the consequences of failing to object – which is more than due process requires. A creditor receiving such notice would have known that its debt could be adversely affected by the proposed plan, and that it needed to file an objection if it wished to avoid that result.[5] Funds raised no such objection, nor did it

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[5] Even after the bankruptcy court confirmed the plan, Funds had an opportunity to dispute it. The notice attached to the proposed plan specifically advised that the "amount of the claim [Funds] filed differs from the amount listed for payment in [Espinosa's] plan," and warned Funds that its "claim will be paid

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appeal the order confirming the plan. We cannot say that Funds was taken by surprise or was denied due process. Quite the contrary: Funds appears to have been a willing participant, perfectly happy to receive the benefits of the Chapter 13 plan, but unwilling to suffer the consequences of its failure to file an objection.

The three circuits that have held that the creditor is denied due process in circumstances such as these appear to have a different understanding of what due process requires. As best we can follow their reasoning, it is that a creditor who is entitled to heightened notice by statute is also entitled to such heightened notice as a matter of due process. This footnote from *In re Banks,* the first circuit case to adopt this novel approach, tries to explain this rationale: "We do not today hold that the Constitution in itself requires a summons and service of process to discharge student loan debt. We merely confirm that where the Bankruptcy Code and Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect." 299 F.3d at 303 n.4. *Accord In re Hanson,* 397 F.3d at 486 ("student loan creditors justifiably rely on the explicit notice provisions of the Bankruptcy Code and Rules and have no reason to act until the service of a summons for an adversary proceeding apprises them that their property rights may

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as listed in the plan" unless the Chapter 13 Trustee received notice within 30 days from Funds that it "wishes to dispute the above stated treatment of the claim." Funds did not object.

be affected."); *In re Ruehle,* 412 F.3d at 683. The Seventh Circuit in *Hanson* goes so far as to say that "Hanson's failure to serve [the creditor] with a summons and an adversary proceeding complaint effectively denied [the creditor] the opportunity of presenting an objection prior to the adjudication of its rights." 397 F.3d at 486 (citing *Mullane,* 339 U.S. at 313-14).

We do not find this reasoning persuasive and thus have no occasion to call for rehearing en banc to consider overruling *In re Gregory.* To begin with, we find it both wrong and dangerous to hold that the standard for what amounts to constitutionally adequate notice can be changed by legislation. The constitutional standard, as we understand it, requires that a party affected by the litigation obtain sufficient notice so that it is able to take steps to defend its interests. Congress can, of course, give rights to additional notice, but we find it difficult to see how this can affect the floor provided by due process – either to increase or diminish it.

[9] Even if Congress could affect the constitutional standard, it didn't do so here: Congress made it quite clear that a creditor need only get ordinary notice of a Chapter 13 plan to be bound by its terms. That Congress provided heightened notice requirements for an adversary proceeding, which didn't take place here, is of no consequence. Had there been an adversary proceeding, and had the creditor not been served with a complaint and summons, the creditor may then have been free to ignore the adversary until

it was properly served. But here (and in the similar cases from other courts) there was no adversary proceeding; the creditor's rights were cut off by the Chapter 13 plan, precisely as specified in the notice the creditor did receive. We reject the idea that a creditor who is in the business of administering student loans has a *constitutional* right to ignore a properly served notice that clearly specifies that its debt will be discharged on successful completion of the plan.[6]

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[6] Our Bankruptcy Appellate Panel's opinion in *In re Repp* suffers from the same defect in reasoning. The opinion there bemoans "an unfair Catch-22" and even a "double Catch-22" that the student loan creditor supposedly confronts. *Educ. Credit Mgmt. Corp. v. Repp* (*In re Repp*), 307 B.R. 144, 153 (9th Cir. BAP 2004). We don't see any Catch-22: A creditor who wants to force the debtor to follow the statutory procedure for discharging student debt need only object to the proposed plan on the ground that there has not been a proper undue hardship finding. The debtor must then procure such a finding by bringing an adversary proceeding and serving the creditor with a complaint and summons. As Judge Ryan points out in his well-reasoned dissent, the creditor in *Repp* (like the one in our case) was not subjected to any kind of unfairness:

> It should be pointed out that ECMC was a creditor, had filed a claim, and knew or should have known that its rights could be affected by the plan. It cannot stick its head in the sand, ignore the plan terms, and later claim foul play because it is adversely impacted by the plan. Due process does not place substance over form. Here, the substance is that ECMC had actual knowledge of the plan terms and chose to default. It cannot now seek a second bite of the apple by way of a due process argument.

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In short, we find the due process argument even less persuasive than the statutory argument, despite the eagerness of some of our sister circuits and other courts to adopt it. What appears to be going on is that courts are re-casting what may be a simple statutory violation as a denial of due process so that they can set aside judgments with which they're unhappy. This approach is not consistent with the theory of objective judging, which calls for us to apply the law fairly to the facts and let the chips fall where they may. We see no reason to reconsider the approach we adopted in *In re Gregory,* which we believe is fully consistent with the Supreme Court's teachings in *Mullane,* and with fairness and justice as well.

Conclusion

It is apparent that a number of courts in our circuit, including the district court below, are uncomfortable with the practice of some Chapter 13 debtors to seek to discharge their student debts by working them into their Chapter 13 plans. Some bankruptcy judges have announced that they won't confirm plans that seek to discharge student loan debts without an adversary proceeding, even when the creditor fails to

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Id. at 156. The *Repp* majority would have done well to adopt the view of its dissenting colleague and follow circuit law as announced by *Pardee* and *In re Gregory*. *In re Repp* and cases following it are overruled. *See, e.g., Sallie Mae Servicing Corp. v. Ransom (In re Ransom)*, 336 B.R. 790, 797-98 (9th Cir. BAP 2005).

object to the plan. *See, e.g., Patton v. U.S. Dep't of Educ. (In re Patton)*, 261 B.R. 44, 48 (Bankr. E.D. Wash. 2001); *In re Webber*, 251 B.R. 554, 557-58 (Bankr. D. Ariz. 2000). In fact, one of these opinions has suggested that inclusion of a "non-dischargeable" debt in a Chapter 13 plan "may be the subject of sanctions." *In re Patton*, 261 B.R. at 48.

[10] For reasons explained above, we view matters quite differently. Our long-standing circuit law holds that student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, after receiving notice of the proposed plan, *Pardee*, 193 F.3d at 1086, and that such notice is not constitutionally inadequate. *In re Gregory*, 705 F.2d at 1123. We find it highly unlikely that a creditor whose business it is to administer student loans will be misled by the customary bankruptcy procedures or somehow be bamboozled into giving up its rights by crafty student debtors. If the creditor fails to object, it is doubtless the result of a careful calculation that this course is the one most likely to yield repayment of at least a portion of the debt. In such circumstances, bankruptcy courts have no business standing in the way. Cases such as *In re Webber* and *In re Patton* are, to that extent, overruled.

[11] The district court's judgment reversing the bankruptcy court is reversed. The case is remanded to the bankruptcy court for reinstatement of the order enforcing the discharge injunction and for a determination whether the creditor acted willfully in violating the injunction under the standard we announced

in *ZiLOG, Inc. v. Corning (In Re ZiLOG, Inc.)*, 450 F.3d 996 (9th Cir. 2006).[7]

REVERSED and REMANDED.

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[7] As we held in *Zilog*:

> A party who knowingly violates the discharge injunction can be held in contempt under section 105(a) of the bankruptcy code. *See In re Bennett*, 298 F.3d at 1069; *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002) (holding that civil contempt is an appropriate remedy for a willful violation of section 524's discharge injunction). In *Bennett*, we noted that the party seeking contempt sanctions has the burden of proving, by clear and convincing evidence, that the sanctions are justified. We cited with approval the standard adopted by the Eleventh Circuit for violation of the discharge injunction: "[T]he movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction."

450 F.3d at 1007 (citing *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002) (citing *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996)). That the creditor may have believed that the discharge was inappropriately entered, or that it could be set aside under Rule 60(b), is of no consequence. A creditor is not free to violate the discharge injunction because it has doubts as to the validity of the discharge. If the creditor believes the discharge is defective, it may petition the bankruptcy court to reopen and set aside the judgment under Rule 60(b), but it may not commence collection proceedings unless and until the court grants such relief. If the bankruptcy court finds that the creditor here willfully violated the injunction, it shall, at the very least, impose sanctions to the extent necessary to make Espinosa whole. *See* 2 Collier Bankruptcy Manual (3d rev. ed.) ¶ 524.02[2][c] ("In cases in which the discharge injunction was violated willfully, courts have awarded debtors actual damages, punitive damages and attorney's fees.") (footnote omitted).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO J. ESPINOSA, *Plaintiff-Appellant*, v. UNITED STUDENT AID FUNDS, INC., *Defendant-Appellee.*	No. 06-16421 D.C. No. CV-04-00447-RCC OPINION

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted
April 16, 2008 – San Francisco, California

Filed June 24, 2008

Before: Alex Kozinski, Chief Judge,
A. Wallace Tashima and
N. Randy Smith, Circuit Judges.

Per Curiam Opinion

COUNSEL

Michael J. Meehan, Munger Chadwick, Tucson, Arizona; James L. Robinson, Jr., Robinson & Rylander, P.C., Tucson, Arizona, for the plaintiff-appellant.

Madeleine C. Wanslee, Gust Rosenfeld P.L.C., Phoenix, Arizona, for the defendant-appellee.

OPINION

PER CURIAM:

Espinosa obtained $13,250.00 in student loans from United Student Aid Funds, Inc. (Funds). He later filed a Chapter 13 bankruptcy petition and plan. The plan provided that he repay the $13,250.00 principal, and that accrued capitalized interest, penalties and fees be discharged. The clerk of the bankruptcy court mailed a notice of commencement and a copy of the proposed plan to Funds, which gave Funds the usual notice of the date and time of the plan confirmation hearing and the deadline for filing objections to the plan. Funds then filed a proof of claim for $17,832.15, which presumably included unpaid accrued capitalized interest, penalties and fees. But Funds filed no objections to the plan, and as there were no other creditors, the bankruptcy court confirmed the plan as proposed. Espinosa subsequently paid Funds $13,250.00 over the course of four years, at which point the plan was completed and the bankruptcy court issued a discharge order, filed May 30, 1997. Curiously, the discharge order provided that Espinosa was "discharged from all debts provided for by the plan . . . except any debt . . . for a student loan," which contradicted the terms of the plan and pretty much rendered the whole exercise pointless from Espinosa's point of view. Curiouser still, Espinosa did not seek reconsideration of the discharge order, nor did he appeal.

Three years after the discharge order was filed, Funds began "offsetting" or "intercept[ing]" Espinosa's income tax refunds to satisfy the unpaid portion of the student loan. (The parties don't explain what they mean by "offsetting" and "intercept[ing]," but we assume they mean that Funds somehow got ahold of Espinosa's income tax refund check, and kept the money for itself.) Espinosa petitioned the bankruptcy court for an order holding Funds in contempt for violating the discharge injunction. *See* 11 U.S.C. § 524(a)(2). Funds cross-moved for relief from the bankruptcy court's order confirming the plan, on the ground that the order had been entered in violation of Funds's rights under the Bankruptcy Code and Rules, and the Due Process Clause.

This is the nub of Funds's argument: To satisfy its obligations under the Bankruptcy Code, a Chapter 13 debtor usually only has to notify creditors by mail of the deadline for filing objections and when the confirmation hearing will occur, Fed. R. Bankr. P. 2002(b), as Espinosa did here. However, student loans may be discharged under Chapter 13, 11 U.S.C. § 1328(a)(2), only if the debtor can show "undue hardship," *id.* § 523(a)(8), and such a showing can only be made in an adversary proceeding, Fed. R. Bankr. P. 7001(6). To initiate an adversary proceeding, a debtor must file a complaint, *id.* 7003, which must be served on the creditor along with a summons, *id.* 7004. Espinosa didn't commence an adversary proceeding and therefore did not obtain a judicial declaration of "undue hardship." Absent such

a declaration, Funds argues, the bankruptcy court lacked authority to discharge the student loan debt by means of the Chapter 13 plan. Funds's motion for relief from the discharge order was based on the fact that Espinosa obtained his discharge without following the statutorily-prescribed procedures for discharging student loan debt.

The bankruptcy court held that Funds violated the discharge injunction and ordered Funds to cease all collection activities against Espinosa. The court also denied Funds's motion for relief from the confirmed plan, holding that the plan became final when it was confirmed and that Funds should have objected to any procedural defect before confirmation. Funds appealed to the district court, which reversed. According to the district court, the order confirming the plan is void because Funds received insufficient notice and was thus denied due process. Espinosa appeals.

Funds argues that the confirmed bankruptcy plan is void, because Funds didn't receive service of a complaint and summons and there was no adversary proceeding to establish "undue hardship," which the Bankruptcy Code and Rules require as a condition for discharging a student loan debt. We rejected this argument in *Great Lakes Higher Educ. Corp.* v. *Pardee* (*In re Pardee*), 193 F.3d 1083, 1086 (9th Cir. 1999). Like Funds, the creditor in *Pardee* received notice of the debtor's proposed Chapter 13 plan, which provided for discharge of the student loan debt without the benefit of an adversary proceeding or an undue hardship finding. *Id.* at 1084. The creditor did

not object, the bankruptcy court confirmed the Chapter 13 plan and the student loan debt was eventually discharged. *Id.* Years later, the creditor argued that the confirmed plan wasn't final under 11 U.S.C. § 1327(a), because the debtor had failed to follow the proper procedures for obtaining a student loan discharge. *Pardee*, 193 F.3d at 1086. We pointed out in *Pardee* that the creditor there, like Funds here, had timely notice of the Chapter 13 plan and failed to object. We held that the creditor "should have raised this argument [about the absence of an adversary proceeding and a finding of undue hardship] in the bankruptcy court by objecting to the plan prior to its confirmation, or by appealing the bankruptcy court's confirmation of the plan. It failed to do either." *Id.*

Relying on the Tenth Circuit's opinion in *Andersen* v. *UNIPAC-NEBHELP* (*In re Andersen*), 179 F.3d 1253, 1258 (10th Cir. 1999), *overruled by Educ. Credit Mgmt. Corp.* v. *Mersmann* (*In re Mersmann*), 505 F.3d 1033, 1046-47 (10th Cir. 2007) (en banc), we held that "[i]f a creditor fails to protect its interests by timely objecting to a plan or appealing the confirmation order, 'it cannot later complain about a certain provision contained in a confirmed plan, even if such a provision is inconsistent with the Code.'" *Pardee*, 193 F.3d at 1086. In reaching this conclusion, *Pardee* also relied on a long line of cases, from our circuit and elsewhere, that "recognized the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions." *Id.*; *see, e.g.*, *Andersen*, 179 F.3d at 1258; *In re Szostek*, 886 F.2d 1405, 1409-10 (3d

Cir. 1989); *Republic Supply Co.* v. *Shoaf,* 815 F.2d 1046, 1049-50 (5th Cir. 1987); *Lawrence Tractor Co.* v. *Gregory* (*In re Gregory*), 705 F.2d 1118, 1121 (9th Cir. 1983); *Ground Sys., Inc.* v. *Albert* (*In re Ground Sys., Inc.*), 213 B.R. 1016, 1020 (B.A.P. 9th Cir. 1997); *In re Walker,* 128 B.R. 465, 468 (Bankr. D. Idaho 1991).

Since *Pardee,* there have been significant developments in this area of the law: Two other circuits have rejected *Pardee*'s reasoning – significantly including the Tenth Circuit, which overruled its own *Andersen* opinion, on which *Pardee* principally relied. *Mersmann,* 505 F.3d at 1046-47; *Whelton* v. *Educ. Credit Mgmt. Corp.,* 432 F.3d 150, 154 (2d Cir. 2005). Our own Bankruptcy Appellate Panel has questioned the reasoning of *Pardee,* albeit by a divided vote. *Educ. Credit Mgmt. Corp.* v. *Repp* (*In re Repp*), 307 B.R. 144, 148 n.3 (B.A.P. 9th Cir. 2004). And three circuits, as well as our Bankruptcy Appellate Panel, have held that the procedures employed here violate the creditor's due process rights. *Ruehle* v. *Educ. Credit Mgmt. Corp.* (*In re Ruehle*), 412 F.3d 679, 684 (6th Cir. 2005); *In re Hanson,* 397 F.3d 482, 486 (7th Cir. 2005); *Banks* v. *Sallie Mae Servicing Corp.* (*In re Banks*), 299 F.3d 296, 302 (4th Cir. 2002); *Repp,* 307 B.R. at 154.

It is thus fair to say that our position in *Pardee* is in the minority; indeed, among the circuits we now stand alone. Thus, while we (as a three-judge panel) are bound to follow *Pardee* as controlling circuit law, we must not blind ourselves to developments elsewhere. If we were persuaded that our position is

erroneous, we would have the right, and perhaps even the duty, to bring the matter to the attention of our colleagues and suggest that an en banc court be convened to reconsider the matter afresh.

We have therefore taken a look at the cases from the other circuits and do not immediately find them persuasive; the rationale of *Pardee* and *Andersen,* relying as it does on straightforward notions of notice and waiver, seem far more consistent with accepted principles concerning the finality of judgments that transcend this particular corner of the law. But we have no occasion to resolve this matter because, as previously noted, the discharge order in this case simply did not discharge Espinosa's student loan debt. Indeed, it specifically excluded the student loan debt from the discharge. *See* p.7295 *supra.* This order was, to be sure, inconsistent with Espinosa's Chapter 13 plan's terms; in effect, the bankruptcy court did not make good on its promise to the debtor that, if he satisfied the terms of the plan, it would discharge all of his listed debts.

Whether the bankruptcy court could have been held to that promise, and compelled to issue an order discharging the student debt, is an open question. Espinosa could have tested that proposition by asking the bankruptcy court to modify its order to discharge the student loan debt and, failing that, taken an appeal. But he did not. Rather, he allowed the bankruptcy court's discharge order to become final, and the time to appeal lapsed long ago. Nor did Espinosa seek to reopen the judgment by way of Federal Rule

of Civil Procedure 60. *See* Fed. R. Bankr. P. 9024. Instead, Espinosa sought to enforce the discharge injunction against Funds. The obvious problem, of course, is that the discharge injunction simply does not run against Funds because the bankruptcy court's discharge order did not cover its debt. Funds was thus free to collect its debt, and the bankruptcy court seems to have misread its own order when it held otherwise.

Much the same seems to have happened in *Mersmann,* 505 F.3d at 1039-40 & n.5, where the court found that "the clerk of the bankruptcy court automatically generates the discharge orders and simply failed to tailor it [sic] to the facts of Mersmann's case." In *Mersmann,* the bankruptcy court corrected the discharge orders pursuant to Federal Rule of Civil Procedure 60(a). 505 F.3d at 1040. Here, Espinosa did not seek a correction of the order, and the bankruptcy court did not correct the order sua sponte, as it is permitted to do by Rule 60(a). It is possible that the bankruptcy court was unaware of the precise language of its discharge order, and was under the mis-impression that the order did cover the student loan debt; that seems to be the most plausible inference from its order enforcing the discharge injunction against Funds. And it is possible that neither party brought the precise language of the discharge order to the bankruptcy court's attention, as the parties said barely anything about it in their briefs before us.

We therefore remand the case to the district court, with instructions for it to remand to the bankruptcy court. On remand, the bankruptcy court has our express leave to consider whether its discharge order in this case was entered as a result of a clerical error and, if so, whether to correct it so as to conform to Espinosa's Chapter 13 plan. *See Travelers Cas. and Surety Co.* v. *Pac. Gas and Elec. Co.*, No. 04-15605, 2008 WL 1970961, at *1 (9th Cir. May 8, 2008). The remand shall be for this limited purpose and no other, and shall last the earlier of 60 days or until such time as the bankruptcy court enters an order addressing this issue.

The parties shall notify us within 5 days of the entry of the bankruptcy court's order, and we shall determine at that time whether the case requires further briefing or can be resubmitted on the existing briefs and arguments.

SUBMISSION VACATED; REMANDED FOR A LIMITED PURPOSE.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANCISCO J. ESPINOSA, Appellee, vs. UNITED STUDENT AID FUNDS, INC., Appellant.	No. CV 04-447-TUC-RCC **ORDER**

Pending before the Court are the Opening Brief of Appellant (Motion to Reverse the Bankruptcy Court's Order Denying Appellant's Motion for Relief) (Docket #5), Response Brief of Appellee (Docket #7), Reply Brief of Appellant (Docket #8), and Reply Brief of Appellee (Docket #10).

The Court grants Appellant's Motion to reverse the Bankruptcy Court's order and holds that the Confirmation Order is void. This matter is remanded to Bankruptcy Court for an adversary hearing to determine whether Appellee qualifies under the 11 U.S.C. § 523(a)(8) exception for the discharge of his student loan.

I. Factual and Procedural Background

Between August 1988 and February 1989, Appellee executed four student loan promissory notes for a total principal amount of $13,250.00, with varying

rates of interest accrual. On December 7, 1992, Appellee filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code, along with a Chapter 13 Plan ("Plan") in the Bankruptcy Court for the District of Arizona. Appellee sent a copy of the Plan and notice of a hearing on the Plan to Appellant's post-office box address on December 10, 1992. The notice was not particularly addressed to a managing or general agent authorized to accept service of process, yet complied with Federal Rules of Bankruptcy Procedure 2002(b).[1] The Plan stipulated that Appellee's debt to Appellant was $13,250.00 – the original, principal amount loaned to Appellee. In addition, it contained a provision that called for the discharge of any amounts or claims for student loans not stated in the Plan; however, it did not contain any language indicating that not discharging the loan would impose an "undue hardship" from 11 U.S.C. § 523(a)(8). A Notice of Commencement was included along with the Plan that stated that the confirmation hearing would be held on April 15, 1993.

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[1] This notice complied with Fed. R. Bankr.P. 2002(b), which deals with notice to creditors of debtor's Plan. However, as will be discussed later, because it was not addressed to a managing or general agent, as would be proper in order to discharge a portion of Appellee's debt. Therefore it did not comply with Fed. R. Bankr.P. 7004(b)(3), which deals with notice for adversary proceedings.

Appellant filed a Proof of Claim on January 8, 1993, in the amount of $17,832.15.[2] Appellee did not make an objection to the Proof of Claim, nor was any adversary proceeding filed to determine the dischargeability of the loan, yet the Plan was not altered to reflect the amount set forth in the Proof of Claim. The Chapter 13 Trustee filed an objection to confirmation of the Plan on the grounds that Appellant's classification should be changed from priority claim status to general unsecured claim status. On April 9, 1993, Appellant amended his bankruptcy papers to reflect the change.

A Confirmation Hearing was held on April 15, 1993, and the Confirmation Order was entered for Appellee's Plan on May 6, 1993. The only mention of the student loan debt in the Confirmation Order was the reclassification. The Confirmation Order was not mailed to Appellant; however, the Chapter 13 Trustee filed a "Notice to Creditor" that acknowledged the discrepancy between Appellant's Proof of Claim and the amount in the Plan, yet stated that the amount listed in the Plan is what would be followed. This notice stated that the amount in the Plan would be followed "unless the Trustee receives within 30 days

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[2] When a creditor receives a Chapter 13 Plan, it must submit a "Proof of Claim" form, which verifies the amount debtor owes. Here, when Appellant filed the Proof of Claim, it indicated that the amount owed was $17,832.15. This amount included the principal amount ($13,250.00) plus interest that had accrued from March 1, 1989, at 8.00% adjusted and 10.45% variable rates.

from this mailing, a written request for different treatment." Appellant did not reply.

On May 30, 1997, Appellee received the Chapter 13 Discharge of Debtor statement, having paid the Appellant the amount designated in the Plan.

Appellant's loans were subrogated to the Educational Department pursuant to its reinsurance agreement. The Educational Department commenced collection efforts, including attempts to offset tax refunds, against Appellee in November 2000. In an effort to seek relief from the Education Department's collection attempts, in June 2003, Appellee reopened his bankruptcy case and filed a Motion for Violation of the Discharge Injunction, Contempt, Sanctions and Damages on October 2, 2003. Appellee asserted that all interest and other charges had been discharged pursuant to the Chapter 13 Plan.

On October 30, 2003, Appellant filed a Motion for Relief from Order and Response to Debtor's Motion for Violation of the Discharge Injunction, Contempt, Sanctions and Damages. Appellant then requested a recall of Appellee's loan from the Education Department, which was completed on June 3, 2004. On August 4, 2004, Appellant filed a Supplement to Motion for Relief, and a hearing was held the following day. On August 12, 2004, the Bankruptcy Court denied Appellant's Motion for Relief in its Memorandum Decision, and the following day, a formal order was entered. Appellant filed its Notice of Appeal to this Court.

II. Discussion

A. Jurisdiction

This case arises from a final order entered in the United States Bankruptcy Court for the District of Arizona on August 13, 2004, which had subject-matter jurisdiction based on 28 U.S.C. § 1334(b). Appellant timely filed this Appeal to the United States District Court for the District of Arizona on August 18, 2004, that has appellate jurisdiction under 28 U.S.C. § 158(a)(1).

B. Standard of Review

A bankruptcy court's findings of fact are evaluated under a clearly erroneous standard, while its findings of law are reviewed *de novo. Ragsdale v. Haller,* 780 F.2d 794, 795 (9th Cir. 1986). Due process notice is a mixed question of law and fact; therefore it is to be reviewed by this Court *de novo. Demos v. Brown (In re Graves),* 279 B.R. 266, 270 (B.A.P.9th Cir. 2002); *GMAC Mortgaged Corp. v. Salisbury (In re Loloee),* 241 B.R. 655, 659 (B.A.P.9th Cir.1999); *United Student Aid Funds, Inc. v. Pena (In re Pena),* 207 B.R. 919, 920 (B.A.P.9th Cir.1997).

C. Due Process Notice for the Discharge of Student Loans in Light of *Res Judicata*

When an individual files a Chapter 13 Plan, there is a presumption that education loans are nondischargeable, in accordance with strong Congressional

intent. *In re Rifino,* 245 F.3d 1083 (9th Cir. 2001). This is to preserve the student loan program and "assure future generations of students will also have an educational loan available . . . " 125 CONG. REC. S. 9160 (daily ed. July 11, 1979) (remarks of Sen. DeConcini). Congress expanded 11 U.S.C. § 523(a)(8), which mandates the repayment of educational loans, but allows an exception if the debtor demonstrates an "undue hardship" if required to repay the education loan. In order to qualify for this exception, however, the debtor must initiate an adversary proceeding to prove this "undue hardship." *Tenn. Student Assistance v. Hood, (In re Hood),* 541 U.S. 440, 124 S. Ct. 1905 (2004). If a debtor proceeds to have his education loans discharged under the exception, then under Part VII of the Federal Rules of Bankruptcy Procedure, Rule 7004(a), which is quite similar to the Federal Rules of Civil Procedure Rule 4(c)(1), the debtor must serve the summons and a copy of the complaint to the creditor. Fed. R. Bankr.P. 7004(a), *incorporating* Fed. R.Civ. P. 4(c)(1). Service may be completed by first class mail; however, the rule mandates that service must be directed to an officer, a managing or general agent, or to any other officer authorized to accept service of process. Fed. R. Bankr.P. 7004(b)(3), *incorporating* Fed. R. Civ. P. 4(h)(1).

At the hearing, the court will determine whether the debtor has met his burden to qualify for the Section 523(a)(8) exception, which requires the debtor to show: "(1) inability to maintain, based on current

income and expenses, a minimal standard of living if forced to repay the student loan, (2) additional circumstances indicating that this state of affairs is likely to persist for a considerable period, and (3) good faith efforts to repay the loan." *Educ. Credit Mgmt. Corp. v. Repp (In re Repp),* 307 B.R. 144 (B.A.P. 9th Cir. 2004) *citing United Student Aid Funds, Inc. v. Pena (In re Pena),* 155 F.3d 1108,1111 (9th Cir. 1998).

The question in this case then becomes, if this proper Section 523(a)(8) procedure is not adhered to, and a debtor's Plan, which includes the discharge of a portion of his education loans, is confirmed by a bankruptcy court, then does *res judicata* prevent the creditor from subsequently challenging the validity of the Plan based upon lack of due process notice? In 1999, the Ninth Circuit heard a case that dealt specifically with the *res judicata* issue as it pertains to a creditor failing to make an objection to a Chapter 13 Plan that purportedly discharged student debts without following the Section 523(a)(8) procedure. *Lakes Higher Educ. Corp. v. Pardee (In re Pardee),* 193 F.3d 1083 (9th Cir. 1999). In that case, the Ninth Circuit found that since the creditor "failed to file an objection to the plan . . . [and] clearly failed to take an active role in protecting its own interests[,]" then the principle of finality trumped any rights of the creditor. *Id.* at 1086. Agreeing with how the Tenth Circuit reasoned under a similar fact pattern, the court warned that "[a] creditor cannot simply sit on its rights and expect that the bankruptcy court or trustee will assume the duty of protecting its interests."

Id. citing Andersen v. UNIPAC-NEBHELP (In re Andersen), 179 F.3d 1253, 1257 (10th Cir. 1999). The *In re Pardee* court, however, never addressed the question of whether the creditor had due process notice.

This question remained unanswered until 2004 when the Ninth Circuit addressed the concern of due process as it relates to *res judicata. In re Repp,* 307 B.R. at 144. The *In re Repp* court emphasized, what it characterized as the "cornerstone of modern due process," that "notice must be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to object." *In re Repp,* 307 B.R. at 149 *citing Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). While the court stopped short of overruling *In re Pardee* and held that it still remained good law, the *In re Repp* court severely limited the reach of *In re Pardee.*

The debtor from *In re Repp* included a provision in his Chapter 13 Plan, which was mailed out to the holder of his student loan, that stated that because paying beyond the principal of his student loan would create an "undue hardship," the remainder would be discharged pursuant to Section 523(a)(8). *In re Repp,* 307 B.R. at 148. The court recognized that the student loan discharge provision was "illegal" and should not have been in the plan. *Id.* at 152 *citing In re Webber,* 251 B.R. 554, 557-58 (Bankr.D.Ariz. 2000). Because this provision was illegal, the creditor would rely on the fact that (1) the bankruptcy court would

perform its obligation in ensuring that the Bankruptcy Code and rules of procedure were being followed, and (2) Rule 7001(6) would be complied with, which mandates an adversary hearing to determine whether the debtor was eligible for a Section 523(a)(8) exception to the standard rule. *In re Repp*, 307 B.R. at 152-53. Agreeing with the Fourth and Sixth Circuits, the court held that where due process notice falls below that which Rule 7004 requires to discharge a student loan, then *res judicata* will not prevent the creditor from later asserting its rights to object to the illegal provision.[3] *Id.* at 147.

Like the cases cited above, here, Appellee's Chapter 13 Plan attempted to discharge a portion of his student loan since Appellant's Proof of Claim stated the amount indebted was $17,832.15, while Appellee's Chapter 13 Plan listed the amount as $13,250.00. As the Ninth Circuit stated, because Bankruptcy Code and procedures lay out a specific procedure for discharging education loans (which includes service of process notice of the adversary hearing in order to determine whether the debtor has demonstrated an "undue hardship" as required), then the creditor (Appellant) should be able to place

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[3] *Compare Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 303 (4th Cir. 2002) (finding that because there was a lack of notice, then the "confirmation and discharge orders discharging the interest are not entitled to preclusive effect.") *and Ruehle v. Educ. Credit Mgmt. Corp. (In re Ruehle)*, 307 B.R. 28, 33-34 (6th Cir. 2004) *with In re Andersen*, 179 F.3d at 1257.

reliance in the bankruptcy court to ensure the proper procedure will be followed. *See In re Repp,* 307 B.R. at 152-53. If debtor wishes to have his debt discharged, then creditor will receive formal service of process, in compliance with Federal Rules of Bankruptcy Procedure 7004.

The facts show that Appellant complied with procedure by submitting its Proof of Claim in the amount of $17,832.15. Since Appellee did not amend the Plan to reflect this, he had attempted to discharge $4,582.15 of his student loan. In accordance with Ninth Circuit precedent set in *In re Repp,* because this student loan was not discharged according to procedure, which would have given Appellant notice "reasonably calculated" to properly object to this discharge, then *res judicata* will not preclude Appellant from now objecting to the Plan.

III. Conclusion

In light of the Ninth Circuit's ruling in *In re Repp,* even though Appellant received notice of the discharge and the Plan was confirmed, because the correct type of notice in order to comply with Rule 7004(b)(3) was not followed, it does not preclude Appellant from challenging the validity of the Plan based on lack of notice. As the Ninth Circuit precedent on the issue stated: "[t]he minimal service requirements for chapter 13 plan confirmations cannot be used as a way to stay below the creditor's radar . . . " *In re Repp,* 307 B.R. at 154.

Therefore, this Court finds that Appellant was denied due process notice and reverses the ruling of the Bankruptcy Court.

Accordingly, IT IS HEREBY ORDERED that the ruling of the Bankruptcy Court is REVERSED, and the case is REMANDED for further proceedings.

DATED this 18th day of July, 2006.

/s/ Raner C. Collins
Raner C. Collins
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:	Chapter 13
FRANCISCO J. ESPINOSA, Debtors.	Case No. 4-92-03819-EWH
	MEMORANDUM DECISION
	(Filed Aug. 12, 2004)

INTRODUCTION

Are the terms of a confirmed Chapter 13 Plan that provide for discharge of a student loan debt binding if the debtor failed to follow the requirements of the Bankruptcy Code and Bankruptcy Rules of Procedure for obtaining a hardship discharge of the student loan obligation? I find that the holding of *In re Pardee*, 193 F.3d 1083 (9th Cir. 1999) controls and requires an affirmative answer to the question.

FACTS

The Debtor filed a Chapter 13 Petition ("Petition") and Chapter Plan ("Plan") on December 7, 1992. The Plan which was noticed to all creditors pursuant to Fed. R. Bankr. P. 2002(b), including United States Student Aid Funds ("USA Funds") and the United States Department of Education ("DE") (collectively "Student Loan Creditors"), provided for the payment of $13,250.00 in outstanding student loan debt owed to a number of different student loan

creditors. The Plan provided that "any amounts or claims for student loans unpaid by this Plan shall be discharged." Both the Plan and the 341 notice listed April 15, 1993 as the date of the confirmation hearing. The Plan provided that any objections to the Plan be filed seven (7) days prior to the confirmation hearing.

On January 18, 1993, USA Funds, apparently on behalf of all of the outstanding student loan creditors, filed an unsecured, non-priority claim of $17,832.15. On March 30, 1993, the Chapter 13 Trustee filed an objection to the proposed Plan because the Plan classified the student loan claim as a priority. The Student Loan Creditor did not file a Plan objection. On April 25, 1993, a confirmation hearing was held. There were no objections to the confirmation of the Plan, other than that of the Trustee, which was resolved pursuant to a stipulated order ("Confirmation Order") entered on May 6, 1993.

On June 10, 1993, the Trustee objected to USA Funds' Proof of Claim because the amount of the claim differed from the amount provided for in the Plan. The Trustee served USA Funds with its objection at the address listed on its Proof of Claim. The objection provided that if no response was filed, the claim would be allowed at the Plan amount. There was no response filed. On May 30, 1997, the Debtor received a discharge after completing all Plan payments, including payment of $13,250.00 to USA Funds.

Beginning in 2001, the Student Loan Creditors began collection efforts against the Debtor, asserting the outstanding obligation was in excess of $17,000.00 and that the obligation had not been discharged under the Plan. After various efforts to resolve the matter, the Debtor moved to reopen the case and filed a Motion for Violation of the Discharge, Contempt, Sanctions and Damages ("Motion").

JURISDICTIONAL STATEMENT

Jurisdiction is proper in this case pursuant to 28 U.S.C. § 157(b)(2)(L) and (O).

ISSUES

1. Is the Confirmation Order void?
2. If the Confirmation Order is not void, should sanctions be imposed on the Student Loan Creditors for violation of the discharge injunction?

DISCUSSION

USA Funds and DE have filed two identical briefs opposing the Motion. USA Funds and DE argue that the Confirmation Order is void pursuant to Fed. R. Civ. P. 60(b)(4) (made applicable in bankruptcy cases by Fed. R. Bankr. P. 9023) either because: (1) the Debtor did not give notice of the student loan discharge terms in the Plan in the same manner as if he had filed an adversary proceeding

seeking a hardship discharge under 11 U.S.C. § 523(a)(8), thereby purportedly denying the Student Loan Creditors of their constitutional due process rights; or (2) the bankruptcy court lacked subject matter jurisdiction to enter the Confirmation Order because the Plan contained so-called "illegal" terms which were inconsistent with the Bankruptcy Code's requirement that an adversary proceeding be filed in order to obtain a discharge of a student loan.

I address the argument regarding lack of subject matter jurisdiction first. This exact argument was rejected by the Ninth Circuit in *In re Pardee*, 193 F.3d 1083 (9th Cir. 1999). The facts in *Pardee* are almost identical to the facts of this case. In *Pardee*, the Chapter 13 debtors moved to enforce their discharge and to enjoin the student loan creditor's attempt to collect interest on the student loan obligation. The *Pardee* Plan contained a provision discharging the post-petition interest on their student loan debt. The student loan creditor had notice of the Plan and its discharge provisions but failed to object to the Plan. In *Pardee* the student loan creditor asserted, and the Ninth Circuit considered and rejected, the argument that if a Chapter 13 plan contains so-called "illegal provisions," that the Plan is nugatory and res judicata principles cannot prevent post-discharge collection efforts by the student loan creditor: "[t]his court has recognized the finality of confirmation orders even if confirmed bankruptcy plans contain illegal provisions." *Id.* at 1086, *citing Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995); *Stratosphere Litig. LLC*

v. Grand Casinos, Inc., 298 F.3d 1137; 1143 (9th Cir. 2002).

Recently, the Ninth Circuit has issued a decision which casts some doubt on the continued viability of the holding in *Pardee*. *In re Enewally*, 368 F.3d 1165 (9th Cir. 2004), addressed the question of whether an order which approved a modification to a confirmed plan had a res judicata effect on the creditor. The *Enewally* court cited *Trulis v. Barton* and *Pardee* for the proposition that "it is beyond cavil that once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to res judicata effect." *In re Enewally*, 368 F.3d at 1173 (internal quotations omitted). However, one paragraph later the court states "although confirmed plans are res judicata to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor." *Id.* Certainly, the above-cited language is broad enough to call the holding of *Pardee* into question. But the facts in *Enewally* are significantly different than here, or in *Pardee*. In *Enewally*, the debtor had commenced an adversary proceeding to obtain the "lien-stripping" result noticed in the Plan modification. Even more importantly, the modification which the debtor argued had altered the secured creditor's rights was approved by the bankruptcy court, *conditioned* upon the debtor prevailing in the adversary. On these facts it is clear that the plan

modification could not have a res judicata effect where the validity of the modification was specifically reserved for decision in the adversary. The essence of the *Enewally* holding on res judicata is that "a Chapter 13 plan confirmed while an adversary proceeding was pending would not have res judicata effect on the adversary proceeding." *Id.* Regardless of *Enewally*'s broad language, it did not overrule *Pardee*. Given the different fact pattern in *Enewally*, the similarity of the facts in this case to those in *Pardee*, and *Enewally*'s citation to *Pardee* as "good law," the Student Loan Creditors cannot prevail on their subject matter jurisdiction arguments in this case.

The second argument urged by the Student Loan creditors is that they were denied due process because the notice they received of the Plan was not equivalent to the notice required by Fed. R. Bankr. P. 7001(6), which requires the service of a summons and complaint in order to initiate a complaint to determine if a student loan debt should be discharged under 11 U.S.C. § 523(a)(8). The Student Loan Creditors argue that because *Pardee* does not directly address whether the student loan creditor's due process rights were violated by receiving notice under Fed. R. Bankr. P. 2002, instead of Fed. R. Bankr. P. 7016, that the holding in *Pardee* does not control the outcome of the case.

In re Repp, 307 B.R. 144 (9th Cir. BAP 2004), is a recently decided case very similar to this one, in which the majority agreed with the arguments made by the Student Loan Creditors. The majority found

that the minimal service requirements for Chapter 13 plan confirmations could not be used to elude the obligations to demonstrate undue hardship in an adversary proceeding. However, as pointed out by Judge Ryan's well-reasoned dissent, by deciding that a student loan creditor, who received notice under Fed. R. Bankr. P. 2002(b) of an adverse plan provision, is bound by that provision, the Ninth Circuit necessarily determined that the notice the creditor received satisfied due process requirements. *Id.* at 155.

In this case, USA Funds had several months notice of the Plan and its student loan discharge provisions. USA Funds filed a proof a claim before the Plan confirmation hearing. USA Funds received an objection to its claim shortly after the Plan was confirmed when it could have easily moved under Rule 9023 to revoke the discharge on the grounds that the Plan "illegally" discharged the balance of the Debtor's student loan obligations.[1] It did not do so. As Judge Ryan noted in his dissent in *Repp*, "[t]he idea that a creditor with more than 25 days notice of a plan containing a provision that adversely affects it can ignore the proceeding, sit on its rights, and then raise a due process argument years later, defies common sense." *Id.*; *In re Pardee*, 193 F.3d at 1086 (the student loan creditor "failed to take an active

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[1] A motion to alter or amend a judgment must be filed no later than 10 days after entry of the judgment. Fed. R. Bankr. P. 9023(3).

role in protecting its own interests" and so cannot, years later, expect the bankruptcy court or trustee to protect its interests.) As Judge Ryan also noted, due process does not place form over substance.[2]

In reaching this decision, I do not condone what the debtor did in this case. I agree with the approach adopted by Judge Haines in *In re Webber*, 251 B.R. 554 (Bankr. D. Ariz. 2000) and would not confirm a Chapter 13 plan that contained student loan discharge provisions similar to the provisions in this case. However, what is at issue in this case is not whether the Plan should have been confirmed, but the effect of the Plan's confirmation and the Debtor's receipt of a discharge after making all of the required Plan payments. The *Repp* decision ignores the fact that the holding in *Pardee* is based on the determination that the student loan creditors' failure to object after receiving notice of the Chapter 13 plan and its terms barred it from later attacking the terms of that order. It follows that if the notice the creditor received did not satisfy due process requirements, then the student loan creditors could not have been bound by the terms of the confirmed Chapter 13 plan; however, the Ninth Circuit held in *Pardee* that the creditor was

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[2] The due process requirement is satisfied with notice that is reasonably calculated, under all the circumstances, to apprise interested parties of pendency of action and to afford them the opportunity to object; it must be of such a nature as to reasonably convey the required information and to afford reasonable time for response. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 US 306, 314 (1950).

bound, and therefore, the notice must have been sufficient to satisfy due process.

CONCLUSION

Because I find that because the Confirmation Order is not void, the Debtor's request that the Student Loan Creditors cease and desist all collection activity against the Debtor will be granted. However, because a number of courts agree with the position taken by the Student Loan Creditors, this is not an appropriate case for imposing sanctions for violation of the discharge injunction.[3] Moreover, the Student Loan Creditors have returned tax refunds previously withheld. Therefore, all remaining requests for relief in the Debtor's motion will be denied. An order consistent with the terms of this Memorandum Decision will be entered this date.

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[3] There is a split in the Circuits on the issue. Some courts hold that a confirmed Chapter 13 plan that purports to discharge student loan debt without the filing of an adversary proceeding cannot have res judicata effect on a creditor that did not object to the discharge provision at confirmation. *See e.g., In re Banks*, 299 F.3d 296 (4th Cir. 2002). However, other courts uphold the discharge even where there is a provision in a confirmed Chapter 13 plan that a student loan will be discharged upon completion of the plan and no adversary proceeding to determine the hardship discharge was filed. *See In re Boyer*, 305 B.R. 42 (Bankr. D. Kan. 2004); *In re Andersen*, 179 F.3d 1253 (10th Cir. 1999); *In re Patton*, 261 B.R. 44 (Bankr. E.D. Wash. 2001).

Dated this 12th day of August, 2004.

/s/ Eileen W. Hollowell
EILEEN W. HOLLOWELL
UNITED STATES
BANKRUPTCY JUDGE

Copy of the foregoing mailed this
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Judicial Assistant

Supreme Court, U.S.
FILED
MAY 12 2009
OFFICE OF THE CLERK

No. 08-1134

In The Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

FRANCISCO J. ESPINOSA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Debtor gave notice of a Chapter 13 plan by United States Mail to the address given him to make his loan payments. The proposed plan gave plain and detailed notice that the outstanding principal balance of the Student Loan would be paid but all other charges would be discharged.

Petitioner's Litigation department received the mailing, filed a proof of claim, but did not object to confirmation. Petitioner did not appeal, and collected its entire due under the plan. Petitioner then ignored the bankruptcy court injunction against collection, engaging in self help. When Espinosa sought to enforce the injunction, Petitioner sought relief under Rule 60(b)(4) which required proof that the confirmation order was void, thus requiring a showing of a constitutional due process violation. The questions presented:

1. Does the 5th Amendment make void an order about which Petitioner had actual knowledge, but chose to ignore?

2. Does the fact that Espinosa proposed to have a portion of a student loan discharged without an adversary proceeding, which Petitioner chose not to dispute, render the enforceability of the discharge order under 11 U.S.C. 1327(a) inapplicable?

3. If this Court rules that Due Process requires an adversary hearing, should its ruling be prospective only?

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1. This is a case that, correctly, turned upon the fact that petitioner waived its right to an adversary proceeding by doing nothing, in the face of its knowledge of the plan. It is a waiver case – not a due process case 7

2. Constitutional due process really isn't at issue in this case because of petitioner's actual knowledge of the proceeding 9

3. The opinion below does not conflict with *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). 11

4. The holding in this case does not conflict with the cases Petitioner argues that it does, for either of two reasons: (1) the "conflicting" cases did not consider whether "actual knowledge" mooted the dispute about "what method of notice" is required; or (2) the notice in the conflicting cases did not

"reasonably convey the required information" which due process requires . 15

5. To chisel the adversary proceeding rule into constitutional-due-process stone, or create an exception to the finality dictates of § 1327(a) based upon the importance of the policy underlying a particular Code section, would significantly disrupt bankruptcy administration 20

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CASE OVERVIEW

Respondent Espinosa opposes the grant of *certiorari*. This is a case in which the court of appeals recognized that Petitioner United Student Aid Funds had been aware of the proposal to discharge a minor portion of the debt owed to it without a formal adversary proceeding, but chose to do nothing except take advantage of the plan of arrangement by collecting money from Espinosa for years. The court of appeals appropriately concluded that the Due Process clause is irrelevant to deciding whether a creditor can waive its right to insist upon a full-blown adversary proceeding, for a Chapter 13 plan of which it was aware, participated in and received the benefits of, and later attempted to renounce. It also held that simply because the confirmed plan was not the result of an adversary hearing on "undue burden" – which Espinosa proposed be waived and Petitioner chose not to disagree with – was no reason to make an exception to the binding nature of plans under 11 U.S.C. § 1327(a). The result applied fundamental principles of notice and the finality of judgments. To reverse it will raise great uncertainty in the jurisprudence of both subjects.

The opinion below does not conflict with *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), nor with any other case of this Court. It properly distinguishes other circuit precedent or explains why that precedent is unpersuasive. The Court of Appeals logically and justly decided this case on its facts. The opinion below is the one that got it right, and there is no sense in disturbing it.

There is a key fact which petitioner ignores here, as it did below, and which the Court of Appeals found determinative. Petitioner had actual knowledge of the proceeding and the specific proposal that the plan would call for Espinosa to pay the principal sum of $13,250.00 due petitioner on his student loan, but discharge $4,582.15 of interest. Petitioner did nothing. That fact distinguishes this case from those with which petitioner claims it conflicts. It also makes this case peculiarly ill suited for a grant of certiorari.

STATEMENT OF THE CASE

Espinosa filed a proposed Plan for relief from creditors under Chapter 13 of the Code on December 2, 1992. E.R. 22[1]

Petitioner had an established post office box for the receipt of loan payments. This was furnished to the Bankruptcy Clerk by Espinosa, under Fed. R. Bankr. P. 1007, for the Clerk to use for giving notice. E.R. 15.

Notice of Espinosa's bankruptcy was mailed to Petitioner as required by 11 U.S.C. § 341.[2] Petitioner's litigation department received the notice on December 18, 1992. E.R.28. The notice advised that Espinosa would seek Bankruptcy Court confirmation of his plan on April 15, 1993. The plan accompanied the notice. The Plan prominently featured on top of its first page, in bold letters, the legend "WARNING IF YOU ARE A

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[1] Reference is to the Excerpts of Record filed in the Court of Appeals.

[2] Further references to the Bankruptcy Code will be by section number only, for simplicity.

CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." E.R. 22.

Not only did the plan contain the above-quoted warning, it spelled out plainly and in detail its proposal that the principal of specific education loans, from specific lenders, in specific amounts, would be fully paid, and that all other amounts claimed owing by the debtor, of any nature, not paid under the plan, would be discharged. E.R. 25.

The notice was successful and complete. Petitioner received actual notice of the bankruptcy, of the proposed plan, and of the proceedings scheduled for confirmation of the plan on April 15, 1993, from the Clerk of the Bankruptcy Court, as specified by Fed. R. Bankr. P. 2002(b). E.R. 28. Proof that the actual notice was in fact successful arises from the fact that Petitioner filed a Proof of Claim on January 8, 1993, more than three months before the scheduled hearing to confirm the plan. E.R. 36 (Trustee's Notice to Creditor, reflecting receipt of objection on January 8, 1993.)

Moreover, the notice went exactly where it needed to in order for Petitioner to be advised in the premises, and take action in the Bankruptcy proceeding. A stamped legend on the Proof of Claim demonstrates that the litigation department of the Petitioner received notice. E.R. 28. No better notice could have been given for the purpose of this case.

Petitioner made no objection to the Plan. The Bankruptcy Court confirmed the plan on May 6, 1993. Petitioner did not appeal that order. But there is more.

On June 10th, within the time available to Petitioner to file an appeal, Trustee served notice of the Trustee's objection to Petitioner's proof of claim upon Petitioner. E.R. 36. Service was accomplished by mail to the address specified in Petitioner's proof of claim. The objection notified Petitioner that its claim "differs from the amount listed in the plan [and] will be paid as listed in the plan," which reduced it to $13,250.00. The plan also advised Petitioner that "any amounts or claims for student loans unpaid by this plan shall be discharged. E.R. 25. Petitioner still did not appeal.

The Trustee's notice provided thirty days to object to this treatment of its claim. Petitioner did nothing.

Petitioner bypassed yet another remedy available to it. Petitioner did not file any motion under Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b)(1), (2) or (3) within the one year permitted by the rule for the bringing of such motions. Under those parts of Rule 60, petitioner could have challenged the order of confirmation on the grounds of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct. Instead, petitioner collected its due under the plan, waited for seven years after that, and then began unilaterally intercepting government payments belonging to Espinosa. Then, eleven years after the plan was confirmed, it filed a Rule 60(b)(4) motion, but only after Espinosa forced the issue by reopening the Bankruptcy and moving to enforce the injunction against these kinds of acts by petitioner.

Petitioner argued that the confirmation order was void because unless it had been served with process for an adversary proceeding under Bankruptcy Rule

7001(6), it had been denied due process under the 5th Amendment. Alternatively, it argued that the generally binding nature of a confirmed plan, established by § 1327(a) should be inapplicable where no adversary proceeding had occurred, even though it had never chosen to claim its right to have such an adversary proceeding. The Court of Appeals rejected both contentions.

The Court recognized that Rule 60(b)(4), invoked by Petitioner, restricted the grounds upon which Petitioner could challenge the confirmation order. Pet. App. 11, 12. Because Petitioner had invoked Rule 60(b)(4) the only basis upon which it could gain relief was by proving the confirmation order was "void."

The Court addressed the Petitioner's due process claim in light of the Petitioner's invocation of Rule 60(b)(4), as of course it had to do. App. 18. It recognized, as again it of course had to do, that the due process issue was governed by *Mullane v. Cent. Hanover Bank & Trust Co,* 339 U.S. 306 (1950). *Mullane,* of course, requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* p. 314. Recognizing that "due process does not require actual notice,"*Jones v. Flowers,* 547 U.S. 220, 225 (2006), the court logically concluded that "it follows a fortiori that actual notice satisfies due process." *Ibid.*

Because, as the record makes abundantly clear, App. 21, Petitioner had had notice not only of the pending proceeding but of the potential adverse impact on its claim and what it must do to avoid the adverse

treatment, the Court concluded that Petitioner had been more than adequately accorded due process.

Addressing the statutory argument, the Court concluded that what occurred in this case, by debtor proposing that the hardship hearing be waived, and the creditor acquiescing, presented no conflict between the existence of the statutory provisions about student loan discharge, on the one hand, and § 1327(a)'s establishment that a confirmed plan is binding upon creditor, on the other. The Court said "We see no such conflict; both provisions can operate fully, within their proper spheres." App. 9. As the court further explained, the creditor "can object to the plan until the debtor shows undue hardship in an adversary proceeding." *Ibid.* The Court found no interference with the operation of the statutes which would control how and when a student loan discharge is obtained[3] merely by the later enforcement of the finality of a plan pursuant to §1327(a):

> "[W]hen the creditor is served with notice of the proposed plan, it has a full and fair opportunity to insist on the special procedures available to student loan creditors by objecting to the plan on the ground that there has been no undue hardship finding. Rights may, of course, be waived or forfeited, if not raised in a timely fashion. This doesn't mean that these rights are ignored, or that a judgment that is entered after

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[3] §§ 523(a)(8) (requiring finding of undue hardship for discharge), 1328(a)(2) (making § 523(a)(8) applicable in Chapter 13 cases) and § 1325(a)(1) requiring a Chapter 13 plan to conform to the requirements of the Code.

a party fails to assert them conflicts with the statutory scheme or is somehow invalid.

"The Bankruptcy Code's finality provision comes into play much later in the process, after the bankruptcy proceedings come to an end." App. pp. 10, 11.

Petitioner and the *Amici* come to this Court asking it to hold that actual notice – more precisely "knowledge" of the entire situation – does not satisfy due process unless Bankruptcy Rule 7001(6) is followed, regardless whether they requested that it be. They also ask this Court to hold that if an order is confirmed by a process omitting a procedure, their right to which they knowingly waived, the terms of the confirmed plan cannot be enforced by the Bankruptcy Court's injunctive powers.

REASONS TO DENY CERTIORARI

1. This is a case that, correctly, turned upon the fact that petitioner waived its right to an adversary proceeding by doing nothing, in the face of its knowledge of the plan. It is a waiver case – not a due process case.

This case is a poor candidate for *certiorari* because the fact that Petitioner had full knowledge and chose to waive its rights is incontrovertible and was the major premise for the decision below. The Court correctly observed:

"It makes a mockery of the English language and common sense to say that [Petitioner] wasn't given notice, or was somehow ambushed

> or taken advantage of. The only thing the creditor was not told is that it could insist on an adversary proceeding and a judicial determination of undue hardship. But that's less a matter of notice and more of a tutorial as to what right the creditor has under the Bankruptcy Code – a long-form *Miranda* warning for bankers." App. p. 16.

This case, and the questions Petitioner asks this Court to review, are cabined by the procedure that brought it here. Having slept on its rights for eleven years, petitioner could only move for relief from the stay under Fed. R. Civ. P. 60(b)(4)("That the judgment is void.") Unless petitioner could prove that the order confirming the plan was void, it could not obtain relief. If Petitioner could not prove that it was denied due process, it could not prove that the order of confirmation was void. Petitioner *could not* prove a due process violation, because it not only received notice, that notice more than satisfied the requirements of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). It had knowledge of the hearing date to confirm the plan, and its proposal that, if the plan was confirmed the principal of its debt would be paid, and the remainder discharged.

Petitioner's entire argument in this case has been about the *quality* of the notice it received, notwithstanding that it received actual notice. *See, e.g.* Petition p. 4, (notice was given "only by mail," and not by "service"); p 12, ("notice . . . was given . . . no adversary proceedings were commenced"); p. 21 ("Espinosa's plan . . . was merely mailed . . . to the post office box . . ."); p. 24 ("USA Funds never had 'proper notice' . . .). *See, e.g.* Ninth Cir. Ans. Br. p. 4

(Espinosa gave "no particularized notice of the Plan"); p. 11 (notices went to P.O. Box instead of a "person authorized to accept service of process"); p. 16 (notice "merely satisfied the lower notice threshold of Bankruptcy Code Section 1324 and Bankruptcy Rule 2002(b)"); p. 17 (conceding that Espinosa gave "good *notice*" but complaining that "he did not *serve* a complaint and summons as required by Rule 7001 and 7004")(emphasis in original).

It is understandable that Petitioner poses its argument thusly, because those cases which arguably conflict with this one (which almost *none* do because of the pivotal fact that Petitioner here had full knowledge, *See* ¶ 4 *infra*) conclude that because the issue of discharge of student loans is such a public policy favorite, due process *does* require "super notice." However, the fact remains: Petitioner had not only good notice, but knowledge. So this case is a poor vehicle in which to decide whether for certain claims or issues, embodying arguably more important policy reasons than others, due process notice can *only* be furnished through the summons and adversary process.

2. Constitutional due process really isn't at issue in this case because of petitioner's actual knowledge of the proceeding.

Before this Court might reach the issue of whether student loan discharges involve such important policy that as a matter of constitutional law notice of a proposal for such a discharge must occur with the service of a summons, it must first decide whether a party can be found to have been denied due process even though it had full knowledge of the case, the plan,

what the plan would do to its claim, and when plan confirmation would be considered. Unless this Court were to so hold, the type of notice given is irrelevant.

The notion that a party who had actual knowledge and an opportunity to be heard was nonetheless denied due process seems to be virtually non-existent outside of these student loan cases. Since it is true that "due process does not require actual notice," *Jones v. Flower*, 547 U.S. 220, 225 (2006), the issue normally is whether the notice given comported with the due process clause even though not actually received. Probably because of the logic observed in the opinion below, that "a fortiori actual notice satisfies due process," cases holding that actual notice vitiates any argument of denial of due process are not abundant. But they exist. *See, e.g.*:

- *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d Cir. 2005)(due process requirement of *Mullane v. Central Hanover Bank & Trust Co*, satisfied by actual notice even though service in foreign country did not comply with Hague Convention);

- *United States v. Casciano*, 124 F.3d 106, 112-113 (2d Cir. 1997) *cert. den.* (1997)(due process requirement of notice of protection order satisfied by actual notice even though service was invalid);

- *Sullivan v. Choquette*, 420 F.2d 674, 676 (1st Cir. 1969) *cert. den.* (1970)(service of process of writ improper but due process satisfied by wife informing party of its existence);

- *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d. Cir. 1972)("The standards set in Rule 4(d) for service

on individuals and corporations are to be liberally construed, to further the purpose of finding personal jurisdiction in which the party has received actual notice.")

That informal notice satisfies due process even if "formal written notice" is lacking has been recognized in the context of a Chapter 13 plan confirmation proceeding. *In re Pence,* 905 F.2d 1107, 1109 (7th Cir. 1990)("Due process does not always require formal, written notice of court proceedings; informal actual notice will suffice.")

So the due process dispute disappears when a party has knowledge. Nothing more is required.

3. The opinion below does not conflict with *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440 (2004).

What the Constitution requires is different from what a statute or a court rule provides. There is no due process violation merely because the adversary process was not involved. *Tennessee Student Assistance Corporation v. Hood,* 541 U.S. 440 (2004) says as much. Petitioner and the *amici* claim that the Ninth Circuit opinion conflicts with *Hood*, but they ignore or misunderstand its holding: that the acceptable form of notice for a proceeding to discharge a debt is not limited to the issuance of a summons in an adversary proceeding, and that failure to use the adversary proceeding is not a constitutional violation. *Id.*, 541 U.S. at 453.

In *Hood,* this Court considered whether a debtor's proceeding in bankruptcy court to discharge a student

loan he owed to a state implicated the Eleventh Amendment. If it did, the Court would have to decide whether, under the Bankruptcy clause of the Constitution, Article I, § 8, cl. 4, Congress had abrogated state immunity for such a proceeding, thus avoiding a violation of the Eleventh Amendment. *Hood, supra,* p. 443. This Court did not reach the issue of Congressional abrogation, because it held that a bankruptcy court determination of dischargeability was an *in rem* proceeding, *id.* p. 447, and therefore was not "a suit against the state." *Id.* p. 450.

The Tennessee Student Assistance Corporation contended that the adversary proceeding to determine dischargeability, established by Bankruptcy Rule 7001, *did* demonstrate that the dischargeability determination was a suit against the state, and that service of the summons constituted an infringement upon the sovereignty of the state. *Id.* at p. 452. This Court rejected that argument by (1) recognizing that there is no statutory requirement for an adversary proceeding to determine dischargeability, let alone a constitutional dictate for doing so; (2) by recognizing that therefore dischargeability could be determined through use of the motion procedure which did not require service of a summons; and (3) that the possible use of a summons was thus irrelevant to the question of infringement upon a state's sovereignty, because an adversary proceeding was *not mandated,* either as a matter of constitutional requirement or of statutory dictate. *Id.* at pp. 453-54. This Court was very clear. It said:

- "The text of [11 U.S.C.] § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor

could proceed by motion . . . which would raise no constitutional concern." *Id.* p. 453;

• "To conclude that the issuance of a summons, which is required only by the Rules, precludes Hood from exercising her statutory right to an undue hardship determination would give the Rules an impermissible effect. 28 U.S.C. § 2075 ("[The Bankruptcy Rules] shall not abridge, enlarge, or modify any substantive right"). *Id.* p. 454.

A leading commentator on Chapter 13 bankruptcy proceedings has explained quite well how the holding of *Hood* controls:

> "Admittedly, sovereign immunity, not the preclusive effect of confirmation, was the issue in *Hood;* but the point remains that the Supreme Court recognized in *Hood* that an adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to adjudication of the discharge of a student loan. Many of the cases taking issue with *Pardee*[4] and *Andersen*[5] declare the contrary view that the discharge of a student loan by any procedure other than adversary

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[4] *Great Lakes Higher Educ. Corp. v. Pardee*, 193 F.3d 1083 (9th Cir. 1999). The opinion in this case reaffirmed *Pardee*.

[5] *Andersen v. UNIPAC-NEBHELP*, 179 F.3d 1253 (10th Cir. 1999). Following the lead of other circuits which had concluded that the adversary proceeding of Bankruptcy Rule 7001(6) was enshrined in the Due Process Clause, the Tenth Circuit overruled *Andersen* in *Educational Credit Mgmt. Corp. v. Mersmann*, 505 F.3d 1033 (10th Cir. 2007).

> proceeding violates due process. This premise is not consistent with *Hood*." Keith M. Lundin, CHAPTER 13 BANKRUPTCY, 3D. EDITION § 346.1, p. 346-33, (2000 & Supp. 2007).

The case that would control here – *if* this was a due process case – is *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The government must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." This Court has held that "mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988). Here, Petitioner received mail notice – as authorized by the Rule for giving notice of plan confirmation proceedings – of a *plan confirmation proceeding*.[6]

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[6] Petitioner's quibbles about the address to which the notice was given is unavailing, not only because of the fact that it obtained actual knowledge anyway, but because the mailing addresses used here, first by the Clerk in mailing the plan and notice, and then by the Trustee in mailing the follow up notice, were proper. *E.g. In re King*, 290 B.R. 641, 645 (Bnkr. C.D. Ill. 2003)("[A]notice of filing mailed to mortgagee's payment address is sufficient."); *In re Kleather*, 208 B.R. 406, 410 - 12 (Bankr. S.D. Ohio 1997)(forwarding notice to processing address as opposed to service address was sufficient for due process purposes); *In re DaShiell*, 124 B.R. 242, 249 (Bankr. N.D. Ohio 1990)(service at post office box proper because debtor made his loan payments to the post office box.)

4. The holding in this case does not conflict with the cases Petitioner argues that it does, for either of two reasons: (1) the "conflicting" cases did not consider whether "actual knowledge" mooted the dispute about "what method of notice" is required; or (2) the notice in the conflicting cases did not "reasonably convey the required information" which due process requires.

The opinion below and the precedent it reaffirmed, *Great Lakes Higher Educ. Corp v. Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999), stood upon long – established precedents "recogniz[ing] the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions." 193 F.3d 1086. *Pardee* also held that "If a creditor fails to protect its interests by timely objecting to a plan or appealing the confirmation order, 'it cannot later complain about a certain provision contained in a confirmed plan, even if such a provision is inconsistent with the Code.'" *Ibid.* *Pardee* stands upon *In re Gregory*, 705 F.2d 1118 (9th Cir. 1983).

The opinion here reaffirmed and followed the principles of *Pardee* and *Gregory*, which embody the non-remarkable proposition that when a judgment has been entered, has become final, and no appeal has been taken from it, the judgment is binding and cannot be ignored, nor can any arguable errors inherent in that judgment be revisited.

Petitioner claims a conflict between this case and some from other Circuits which hold discharges contained in plans to be void if no adversary

proceeding was conducted. Some of those cases are clearly distinguishable because the creditor did not receive the plan itself as part of its notice, and the notice of a hearing to confirm a plan was held by itself not adequate to inform the creditor that the plan intended to discharge student loan obligations. Others are not in conflict because the "conflicting" case holding did not decide whether the fact of "actual knowledge" mooted the issue of "what method of notice" due process requires. Moreover, they should not be followed because their holdings erroneously find the use of the plan confirmation process to discharge a loan, instead of the adversary proceeding, to be a denial of due process. This case stands apart from Petitioners claimed "conflicting" cases principally because it is based upon the indisputable fact that Petitioner had full knowledge and information about the plan, its confirmation, and the effect upon its claim. None of the others focus on that fact.

These are the cases Petitioner claims conflict with this one:

Ruehle v. Educ. Credit Mgmt. Corp. 412 F.3d 679 (6th Cir. 2005). The *Ruehle* court found that the case before it, "unlike *Andersen* and *Pardee* fails to reflect that the original creditor or its successor . . . had reasonable notice of the proposed plan or an opportunity to be heard prior to the confirmation." *Id.* at p. 683. By contrast, here Petitioner both had actual knowledge and a full opportunity to be heard. In addition, however, *Ruehle* concluded that a discharge obtained without filing an adversary proceeding was void because it was said to ignore the clear intent of congress, and the Judicial Conference, to require an adversary proceeding. Actually, Congress has *not*

mandated an adversary proceeding, instead only requiring that there be a finding of hardship, which Petitioner could have easily required had it voiced a simple objection to the plan. Further, as this Court made plain in *Hood*, the court rules (i.e. *Ruehle*'s reference to the Judicial Conference-adopted Bankruptcy Rules) can neither expand nor contract rights, and thus cannot be enshrined into the due process clause.

Whelton v. Educ. Credit Mgmt. Corp., 432 F.3d 150 (2d Cir. 2005). The creditor "had received" the notice. 432 F.3d at 152. Further, *Whelton* draws the same erroneous conclusion as *Ruehle, supra*. *Whelton* adopted the *Ruehle* analysis, and both cases have the same flawed reasoning.

Hanson v. Educ. Credit Mgmt. Corp., 397 F.3d 482 (7th Cir. 2005) was a case where creditor "received" notice. *Id.* at 443. But the Seventh Circuit did not base its decision on such "receipt," thus not conflicting with *Espinosa*. *Hanson* then proceeded to hold that "due process entitles creditors to the heightened notice provided for by the Bankruptcy Code [once again misunderstanding the lack of such a provision in the Code, *see, Hood*] and Rules . . . ." *Id.* at p. 486.

Banks v. Sallie Mae Servicing Corp., 299 F.3d 296 (4th Cir. 2002) found that the creditor did "not dispute that it received the proposed plans, the hearing notice, and the confirmation order." *Id.* at 299. Like *Whelton* and *Hanson*, *Banks*, too, errs both in thinking that the Bankruptcy Code specifies the required notice for a proceeding to determine dischargeability of a student loan, and in enshrining into the constitutional due process clause the Bankruptcy rule which *Hood* later

found not to be the exclusive method of determining student loan discharges. The Fourth Circuit did not have the benefit of this Court's *Hood* opinion, which drains *Banks* of any vitality, and renders it further irrelevant as a purported "circuit conflict."

Educ. Credit. Mgmt. Corp. v. Mersmann (In re Mersmann), 505 F.3d 1033 (10th Cir. 2007). For named debtor Mersmann the creditor "received notice, but failed to object."*Id.* at 1039. For creditor Seiwert, whose case was also decided in *Mersmann,* the scope and clarity of the notice, and whether it could be concluded that the creditor did in fact have knowledge of the proceeding, was not mentioned in any way. *Id.* at 1040. *Mersmann* based its decision in part in reliance upon *Banks, supra,* and *Ruehle, supra,* including their erroneous perceptions that the Bankruptcy code mandated use of an adversary proceeding. 505 F.3d at 1046. It based its disagreement with its own *Andersen* case, and *Pardee,* also on the erroneous belief that the bankruptcy code required adversary proceedings. *Ibid.* And it overlooked the importance of the point in *Whelton, supra,* that giving notice as part of plan confirmation is only insufficient if the terms affecting the student loan creditor "were not sufficiently evidenced in a plan to provide adequate notice to the creditor." *Id.* at 1047.

Mersmann based its holding upon *dictum* from *Hood* describing the "self executing" nature of the Code section on discharge of student loans. *Id.* at 1048. It also relied upon the *Ruehle* court mis-apprehension that Congress required student loan discharges to occur in an adversary proceeding, when of course it does not. *Ibid. Mersmann* also found a conflict between § 1327(a) and those sections of the code

governing what, when and how discharges are granted.[7] *Ibid.* But all of *Mersmann*'s analysis of statutory conflict presume its major premise – that Congress has mandated a hearing, in an adversary proceeding, to determine hardship, and has also dictated that such a hearing cannot be waived by a creditor, as was done here. For if a creditor can waive the hardship hearing, none of the statues *Mersmann* found to be infringed upon by the rule of *Pardee* (and, now, this case) would in fact have been, because creditor simply waived them and agreed that the discharge order may include student loans. That is what the opinion below held, and it was correct.

The opinion below, the previous *Pardee* opinion, and the Tenth Circuit in *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999)(before it reversed course) got it right. "*Pardee* and *Andersen* stand soundly for the better-reasoned principle that notice of how the Chapter 13 plan affects creditors' rights is all that the Constitution, the Bankruptcy Code and the Bankruptcy Rules require to bind creditors to the provisions of a confirmed plan under § 1327(a)." Keith M. Lundin, CHAPTER 13 BANKRUPTCY, 3D. EDITION § 229.1, p. 229-41, (2000 & Supp. 2007).

This case does not conflict with the above opinions because it bases its holding on the full, complete, information that Petitioner actually received, a fact

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[7] 11 U.S.C. § 523(a)(8)(requiring undue hardship to discharge student loan), § 1328(a)(2)(making § 523 applicable to Chapter 13 proceedings), and § 1325(a)(1)(requiring plans to conform to the Code).

upon which none of the erstwhile "conflicting" cases based its holding. Moreover, this case reasoned correctly in the legal analysis that it spoke about in common with the other cases.

5. To chisel the adversary proceeding rule into constitutional-due-process stone, or create an exception to the finality dictates of § 1327(a) based upon the importance of the policy underlying a particular Code section, would significantly disrupt bankruptcy administration.

The opinion below, and its predecessor *Pardee,* held that by its inaction, a Creditor waived its right to object. To grant *certiorari* in order to reverse this rule, allowing long-final judgments confirming plans of arrangement to be attacked for legal error, would work a major encroachment upon the highly important interest not only in finality of orders confirming plans or reorganization in Bankruptcy, but of judgments in general.

The specification of adversary proceedings to determine dischargeability of a debt is a creation of the Bankruptcy Rules. 7001(6). The rule is not unique to student loan discharges; it applies to all discharges. *Ibid.* There are numerous circumstances specified in 11 U.S.C. § 523(a) requiring denial of a discharge to the debtor. Each and every one of them has strong policy reasons prompting the denial of a discharge. Some of them are:

- Money or property obtained by fraud or false pretenses. § 523(a)(2);

- Fraud, embezzlement or larceny while acting as a fiduciary. § 523(a)(4)[8];

- Domestic support obligations. § 523(a)(5);

- Willful or malicious injury. § 523(a)(6);

- Fines, penalties or forfeitures that are not compensation for actual pecuniary loss. § 523(a).

If this Court were to accept Petitioner's argument that due process is offended when an adversary proceeding is not used to determine dischargeability of student loans, it would generate litigation throughout the Circuit, District and Bankruptcy courts, in one of two ways. A blanket rule requiring the same result for all discharge issues and other matters where the Rules call for an adversary proceeding inevitably would have to be confirmed for the various kinds of discharge. Or the courts would have to begin deciding which other issues implicate policy reasons strong enough to militate against discharge without an adversary proceeding, even where debtor proposes that such a hearing be waived, and creditor does not object. Then creditors would begin opening up old cases, invoking whichever version this Court chose. Is there, then, to be a due process violation if a debtor files a plan with his or her petition, listing one of the above non-dischargeable debts for discharge, the creditor does not object, and the plan is confirmed? We think not.

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[8] This was the provision involved in *In re Gregory* 705 F.2d 1118 (9th Cir. 1983). Petitioner's claim that *Gregory* is distinguishable from this case because upon presumptive dischargeability, or non-dischargeability, is not correct.

If it were to be a violation of due process not to use the adversary procedure, then every plan that was confirmed with a discharge (not even limited to student loan discharges) without an adversary proceeding is void. If it is void, there is no time limit under Rule 60(b)(4) within which a creditor may open up the plan. This puts in jeopardy every single such plan, extending for years into the past.

6. Adopting the rule Petitioner seeks would also have broad ramifications for due process and the finality of judgments.

Considering the breadth and scope of the impact of § 1327's finality on bankruptcy administration shows just how unwise it would be to accept Petitioner's arguments.

11 U.S.C. § 1327(a) provides:

> "Upon confirmation of a plan, the plan and its provisions shall be binding upon the debtor and upon all creditors of the debtor, whether or not they are affected by the plan or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed or are allowable."

As Judge Lundin aptly described it in his authoritative treatise:

> "Confirmation is the bright line in the life of the Chapter 13 case at which all the important rights of creditors and responsibilities of the debtor are defined and after which all rights and remedies must be determined with

reference to the plan. Once the confirmation order becomes final, the effect of confirmation is comprehensively defined in § 1327 of the Code." Lundin, *supra,* §228.1, p. 228-1.

As one court has said:

> "A Chapter 13 bankruptcy case, unlike the typical civil case, can involve several discrete disputes within it which are disposed of sometimes over the course of several years. It is important for the orderly and efficient administration of the case and for the curing of the rights of the parties to the case that the issues, including the issue of subject matter jurisdiction resolved by the order confirming a Chapter 13 plan, not be subject to reconsideration (except in the case of fraud) after the direct appeals process for the order has ended." *Lester Mobile Home Sales v. Woods (In re Woods)*, 130 B.R. 204, 208 (W.D. Va. 1990).

There is a long history of reported decisions recognizing the special finality of confirmation orders in reorganization cases. *E.g. Stoll v. Gottlieb*, 305 U.S. 165 (1938); *In re Robert L. Helms Constr. & Dev. Co.*, 139 F.3d 702, 704 (9th Cir. 1998) (*En Banc*)("A confirmed reorganization plan operates as a final judgment with res judicata effect."); *Multnomah County v. Ivory (In re Ivory)*; 70 F.3d 73 (9th Cir. 1995)(taxing authority failure to object to confirmation left it bound by a plan that redeemed property from a tax foreclosure judgment "even assuming that the order confirming the plan was in error.").

The binding nature of a plan, once confirmed, has long been a pivotal aspect in bankruptcy reorganizations in general, and of Chapter 13 cases in particular. *See, e.g. Factors Funding Co. v. Fili (In re Fili)*, 257 B.R. 370, 372 – 74 (B.A.P. 1st Cir. 2001)("Plan confirmation is a final order, with res judicata effect, and is imbued with the strong policy favoring finality");*In re Elstein*, 238 B.R. 747, 754 (Bankr. N.D. Ill. 1999)("The order confirming a chapter 13 plan . . . has res judicata effect as against the IRS with respect to the question of eligibility for chapter 13 relief."); *Marlow v. Sweet Antiques (In re Marlow)*, 216 B.R. 975, 979 (Bankr. N.D. Ala. 1998)("Pursuant to § 1327, the order of confirmation in a chapter 13 case constitutes res judicata as to all justiciable issues which were *or could have been* raised prior to confirmation." Therefore confirmation order allowing claims bars debtors' post confirmation preference action to avoid a judicial lien.)(emphasis added); *In re Brenner*, 189 B.R. 121, 128 (Bankr. N.D. Ohio 1995)("The doctrine of res judicata, equity, and the policies underlying the Bankruptcy Code" all preclude the IRS's challenge to a confirmed plan that treats it as a priority unsecured claim holder notwithstanding that the IRS filed a proof of claim assesrting secured status.); *McDonough v. Plaistow Coop. Bank (In re McDonough)*, 166 B.R. 9 (Bankr. D. Mass. 1994)(Bank precluded from objecting to avoidance of its lien after confirmation where the bank failed to object to confirmation of a plan that provided for same.)

A creditor cannot use a post confirmation motion for relief from the stay to collaterally attack the confirmed plan if the creditor failed to object or appeal the order of confirmation, notwithstanding that the confirmed plan contains provisions the creditor could

have defeated in a timely objection to confirmation. *E.g. Chevy Chase Bank v. Locke (In re Locke),* 227 B.R. 68, 71 (E.D. Va. 1998)(plan confirmed value of bank collateral lower than the amount contained in an approved proof of claim); *In re Walker,* 128 B.R. 465 (Bankr. D. Idaho 1991)(plan that modified creditor's rights in violation of 11 U.S.C. §1322(b)(2) is res judicata. Creditor received notice of confirmation and copy of plan, but did not object.); *Green Tree Fin. Corp. v. Garrett (In re Garrett),* 185 B.R. 620, 623 (Bankr. N.D. Ala. 1995)(confirmation bound creditor to accepting cure of defaults and the maintenance of payments through the plan, notwithstanding that creditor had been granted relief from stay prior to confirmation.)

The recognition of finality represented by this case and *Pardee* (which it merely applied) is not unique to student loans. *E.g. In re Harvey,* 213 F.3d 318 (7th Cir. 2000)(lien stripping):

> "It is a well-established principal of bankruptcy law that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan. 11 U.S.C § 1327(a) . . . The reason for this mirrors the general justification for res judicata principles . . . This is especially true in the bankruptcy context, where a confirmed plan acts more or less like a court-approved contract or consent decree that binds both the debtor and all the creditors. . . . It is perfectly reasonable to expect interested creditors to review the terms of a proposed plan and object if the terms are unacceptable, vague, or ambiguous." 213 F.3d at 321, 22.

Confirmation orders containing terms conflicting with a variety of sections of the Bankruptcy Code have been held to be res judicata where the creditor did not object to the plan, or appeal from it. *E.g. In re Young*, 281 B.R. 74, 80 (Bankr. S.D. Ala. 2001)(confirmation occurred before expiration of redemption period under 11 U.S.C. § 108(b), an objection pursuant to 11 U.S.C. § 1325(a)(5) could have been raised and litigated, but plan is binding whether in fact it was); *In re Bonanno*, 78 B.R. 52 (Bankr. E.D. Pa. 1987)(plan gave co-signors broader rights than permitted under 11 U.S.C. § 1301); *Homebanc v. Chappell (In re Chappell,* 984 F.2d 775, 782 – 83 (7th Cir. 1993)(mortgage interest under 11 U.S.C. § 506(b)); *Nationsbanc Mortgage v. Williams (In re Williams)*, 276 B.R. 899, 907 – 10 (C.D. Ill. 1999)(Bank failed to object to plan, of which it was given a copy and 25 days' notice of confirmation hearing, and was bound by plan that did not give it the protection of 11 U.S.C. § 1322(b), rejecting due process claim such as argued here); *In re Stewart,* 247 B.R. 515, 521 (Bankr. M.D. Fla. 2000)(Mortgage holder failure to object to plan that did not afford it arrearages, notwithstanding § 1322(b) prohibited such a plan, bound mortgage holder; rejecting due process claim like that asserted here); *In re Battle*, 164 B.R. 394, 395 – 99 (Bankr. M.D. Ga. 1994)(failure to object to plan that omitted arrearages, in contravention of 11 U.S.C. § 502(b)(2) made the plan binding)

In this case petitioner had full, detailed notice of the plan's proposal to discharge interest and bind debtor only to pay the principal of the student loans. It is thus distinguished from cases like *Piedmont Trust Bank v. Linkus (In re Linkous),* 990 F.2d 160 (4th Cir. 1993) where the confirmation notice was later determined to be insufficient to bind the creditor,

because the notice, consisting of a summary of the plan, did not "reasonably convey the required information" that debtor intended "to re-evaluaate the secured claims pursuant to § 506(a)". *Id.* at 162, 63, citing *Mullane v. Cent. Hanover Bank & Trust Co,* 339 U.S. 306, 314 (1950). Therefore the plan confirmation and discharge orders here are just as binding as in the myriad of cases just cited.

Obviously, if this Court were to grant *certiorari*, reverse, and hold that an order of confirmation is not *res judicata* because there may be erroneous or even illegal provisions in it, a very large number of cases to the contrary would be overruled or cast in doubt. "*Andersen* and *Pardee* are not aberrations – they are mainstream statements of the powerful binding effect of confirmation of a Chapter 13 plan under [11 U.S.C.] § 1327(a)." Keith M. Lundin, CHAPTER 13 BANKRUPTCY, 3D. EDITION § 229.1, p. 229-35–36, (2000 & Supp. 2007).

Enforcing the finality of a plan of confirmation in the face of irregularities or errors in the terms of the plan is not a phenomenon restricted to student loans. Student lenders have not been "singled out" for unfair treatment. For Example:

- A creditor's failure to object to confirmation of a plan is fatal to a creditor's objection that it didn't provide the present value required by § 1325(a)(5). *In re Szostek*, 886 F.2d 1405 (3d Cir. 1989).

- A taxing authority's failure to object to confirmation left it bound by a plan that redeemed property from a tax foreclosure judgment "[e]ven assuming that the order confirming the plan was in

error." *Multnomah County v. Ivory*, 70 F.3d 73, 75 (9th Cir. 1995).

- A plan which proposed a "zero" payment upon an embezzlement debt was binding because the notice of confirmation hearing, and summary of the plan, was adequate notice to creditor. *In re Gregory*, 705 F.2d 1118 (9th Cir. 1983).

- A creditor is bound by a provision prohibiting action against a cosignor notwithstanding that the confirmed plan is broader than the statutory protection of cosignors in 11 U.S.C. § 1301. *In re Bonanno* 78 B.R. 52 (Bankr. E.D. Pa. 1987).

This case does not conflict with the cases from other circuits, ¶ 4, which Petitioner raises. Rather, *those* cases are in conflict with the virtual flood of cases – of which those discussed here are but a fraction[9] – which hold that waiver by a creditor after notice of a plan to which it could have objected as containing terms not compliant with the Code, Rule or case, makes the plan binding, and requires the creditor to honor it and the bankruptcy court injunction that stands behind it.

To grant *certiorari* and reverse would embark this Court and all the other federal courts at every level on a wave of litigation to determine which "errors" in a plan make it "void," or which notification procedures

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[9] *See* Lundin, § 229.1, p. 229-3 – 229-6 (2000 and Supp. 2007) which comprises one, long, four page, single-spaced footnote citing cases demonstrating just how far flung and important the principle of plan finality is.

carry the constitutional due process gloss and which do not. There is no reason whatsoever to do that, particularly for Petitioner whose legal department knew all about the bankruptcy proceeding, the plan, the proposal in the plan treating portions of the student loan as discharged, and when they could appear and object; but did not.

7. It is neither necessary nor desirable for this Court to grant *certiorari* in order to determine whether a constitutional rule and a fundamental interest in finality of judgments should be altered in order to impact the manner of practice by the bankruptcy bar.

Some of the cases involving the discharge of student loans by a debtor proposing waiver of a hardship hearing are critical of this aspect of Chapter 13 practice. Others, including the opinion below, are not. *See* App. 25 ("It is apparent that a number of courts in our circuit . . . are uncomfortable with the practice of some Chapter 13 debtors to seek to discharge their student debts by working them into their Chapter 13 plans.") *And see* App. 26 (For reasons explained above, we view matters quite differently. Our long-standing circuit law holds that student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, after receiving notice of the proposed plan . . .)

Petitioner and *amici* gang up on debtors and their counsel, attacking them with colorful phrases like "hid[ing] magic language in their" plans, and "set[ting] a trap for unwary courts, trustees, and creditors," or

"discharge by ambush."[10] As has already been shown, this case, at least, contains no taint of deception or an attempt to surprise or "ambush" a creditor. Counsel for Espinosa was completely open about his proposal, and provided full and complete disclosure by sending Petitioner the entire proposed plan, months in advance of the confirmation hearing. This was a procedure sanctioned by the Ninth Circuit. *Great Lakes Higher Educ. Corp. v. Pardee*, 193 F.3d 1083 (9th Cir. 1999).

There are several good and sufficient reasons that might prompt a debtor to prepare a plan that proposes to have the creditor waive its right to a hardship hearing and acquiesce in discharge of some part or all of a student loan, and a creditor to do so. The opinion below identified three:

- Creditor may believe debtor can make the required showing of undue hardship, and "thus see no point in wasting the debtor's money, and its own, litigating the issue." App. 9.

- Creditor may conclude that a Chapter 13 plan "presents its best chance of collecting most of the debt, rather than spending years trying to squeeze blood out of a turnip." *Ibid.*

- Further, the creditor may hope to get some payments from debtor under a plan, with the prospect of collecting more if debtor is unsuccessful in performing the plan. Such

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[10] Brief of Educational Credit Management Corporation, p. 3, Brief of States of Oregon, *et. al.*, p. 3, respectively.

> failure occurs in *most* Chapter 13 cases. App. 10 n. 2.

There is an additional, very practical reason that both debtors and creditors may seriously consider waiving the conduct of a hardship hearing. As noted by *amici* States, "these are usually low dollar cases." Brief of the State of Oregon *et. al.* p. 10. The average payout to unsecured creditors – in the aggregate – is $4,500.00 per case. *Ibid.* The average fee paid to debtor's counsel for a case is $1,000.00. *Ibid* (calculated from figures). It is understandable that Espinosa and his counsel offered Petitioner a chance to waive a full blown adversary hardship hearing over the discharge of $4,582.15 of interest. And it is understandable that Petitioner's litigation department chose to acquiesce. What is not understandable is why petitioner should "have its cake and it eat, too."

This Court has already determined the unacceptability of writing substantive law in the complex bankruptcy field because of creditors' complaints or fears that debtors will flout the bankruptcy laws. *Taylor v. Freeland*, 503 U.S. 638 (1992). Rejecting an argument that § 522(l) should be interpreted to limit debtors' filing of claims of exemption because of fears of abuse, this Court said:

> "Debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings. See, *e. g.*, 11 U. S. C. § 727(a)(4)(B) (authorizing denial of discharge for presenting fraudulent claims); Rule 1008 (requiring filings to "be verified or contain an unsworn declaration" of truthfulness under penalty of perjury); Rule

> 9011 (authorizing sanctions for signing certain documents not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"); 18 U. S. C. § 152 (imposing criminal penalties for fraud in bankruptcy cases). These provisions may limit bad-faith claims of exemptions by debtors. To the extent that they do not, Congress may enact comparable provisions to address the difficulties that Taylor predicts will follow our decision." 503 U.S. at 644, 645.

Making constitutional law, or tinkering with the finality of judgments, out of fear that the remedies noted above aren't sufficient, makes no sense.

8. There is no need, nor sense, in this Court granting *certiorari* to write a special rule for student lenders.

If the Court were inclined to grant *certiorari*, and rule in favor of the Petitioner, what would the opinion say?

First, this Court would have to dispose of the threshold issue by holding that, even though Petitioner had actual knowledge of the bankruptcy proceedings, of the scheduled hearing to confirm a plan, and of the plan itself including precisely how Petitioner's claim was to be treated, that Petitioner can claim that due process allowed it to ignore the plan because the paper bore a different title, or went to a different mailing address, than contemplated by the bankruptcy rules. This Court would then have to invoke due process, or an interpretation of § 1327(a) that opens up great

uncertainty about the uniformity and scope of its operation.

On the statutory issue, this Court would have to hold that even though the confirmed plan was a final judgment, which Petitioner did not appeal, nor challenge in any way until haled into court because it had flouted the injunction and confiscated debtor's property, that Petitioner should now be granted special privileges by virtue of its claimed exalted status as a student loan holder. Should Petitioner be allowed, by an opinion of this Court, to have acquiesced in the judgment, to collect its benefits, yet turn around, renounce the judgment, and begin taking Espinosa's money? Such a holding would eviscerate the bedrock principle of finality. It would sow seeds of uncertainty in determining the finality of judgments under various circumstances.

Because it is indubitably true that Petitioner did nothing in this case notwithstanding its complete knowledge of the proposed plan and its terms, trying to decide due process and plan finality issues here would be awkward at best. It would invite parties to begin litigating the sufficiency of notice notwithstanding their knowledge, and probable waiver, of the right to respond. This single fact suggests that after granting certiorari and grappling with the case more intensively, there is a good prospect that the result would be a dismissal as improvidently granted.

9. If this Court grants certiorari, it must determine whether its ruling should be prospective only, given that Espinosa relied upon a procedure that was acceptable at the time, and thereafter approved by the Ninth Circuit.

If this Court grants *certiorari*, Espinosa will urge this Court to make any reversal have prospective operation only. The Tenth Circuit so held in *Educ. Credit. Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007). Applying the factors impacting a decision whether a civil case decision should be prospective, from *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *Mersman* held that its ruling did not apply to one of the cases decided by that opinion, in which the debtor's action had been consistent with the Tenth Circuit's previous precedent, *Andersen v. UNIPAC-NEBHELP*, 179 F.3d 1253 (10th Cir. 1999). If this Court grants certiorari, Espinosa, whose case was compliant with the Ninth Circuit precedent, *Great Lakes Higher Educ. v. PardeeCorp. (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999), will argue that any change should not be applied to him.

There would be strong reason for this Court to make any ruling prospective, because there are an undetermined number of old cases – doubtless numbering in the thousands – where student loan discharge occurred by waiver of the hardship hearing, in reliance upon the accepted practice of the day. On the other hand, this point highlights the undesirability of this case as a candidate for *certiorari*. Petitioner's complaint is "old news," now being addressed by many courts as a matter of practice or the enforcement of the "good faith" requirements of Chapter 13 adjudication,

explicit and implicit, in the Code. *See, e.g.* opinion below, App. 25, and cases cited.

CONCLUSION

This is a waiver case, not a due process case.

The opinion in this case correctly avoided stretching the due process clause into a tool by which litigants can either make up for their mistakes, or change tactics years after a judgment has become final and been performed. It follows and correctly applies *Hood*. It makes clear that those cases from other circuits which *might* actually be viewed as conflicting with it did not reach the right result.

Due process means the receipt of notice and an opportunity to be heard; neither more nor less. Petitioner received due process. That is the only issue this Court can review, inasmuch as the case arises from Fed. R. Civ. P. 60(b)(4) – that the judgment was "void."

The Petition should be denied.

Respectfully submitted

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In The

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REASONS FOR GRANTING THE PETITION

I. Because the discharge exception of § 523(a)(8) is "self-executing" and requires the bankruptcy court to find undue hardship as a condition to discharging a student loan, USA Funds was entitled to rely upon the law, and cannot be deemed to have waived the bankruptcy court's noncompliance with it.

Espinosa cites no legal authority for his waiver argument, which instead depends upon mischaracterizing the facts and turning bankruptcy law and procedure on its head.

The first premise of Espinosa's argument is the false assertion that his plan "propos[ed] that the hardship hearing be waived." (Brief in Opp. at 6.) The plan said no such thing. In fact, the plan said nothing about undue hardship, an adversary proceeding, or the waiver of either. (E.R. 3.) If Espinosa is suggesting (*see* Brief in Opp. at 6) that the Ninth Circuit characterized the plan as a proposal to waive the requirement of an adversary proceeding and a determination of undue hardship, it could not and did not. Instead, as that court stated, "Espinosa simply listed the student debt in his Chapter 13 plan." (App. 7.)

Espinosa's second premise is that USA Funds knew the details of his Chapter 13 plan and failed to take affirmative action to "claim its right to . . . an adversary proceeding." (Brief in Opp. at 5.) However, as this Court recognized in *Tennessee Student*

Assistance Corp. v. Hood, the § 523(a)(8) exception of student loan debt from discharge is "self-executing" and "[u]nless the *debtor* affirmatively secures a hardship determination, the discharge order will not include a student loan debt." 541 U.S. at 450 (emphasis added). "The current Bankruptcy Rules require the debtor to file an 'adversary proceeding' against the State in order to discharge his student loan debt." *Id.* at 451. Thus, the burden is not on the creditor to commence an adversary proceeding and seek a determination of dischargeability.

That a creditor may therefore disregard a plan provision to discharge a student loan without waiving the legal requirement to first find undue hardship is supported by *Hood*, which recognized that a creditor can ignore an adversary proceeding summons without waiving the court's independent duty to find undue hardship: "Hood concedes that even if TSAC ignores the summons and chooses not to participate in the proceeding the Bankruptcy Court cannot discharge her debt without making an undue hardship determination." *Id.* at 453-54.

Consequently, it follows that a creditor, like USA Funds, can also ignore a mere discharge declaration in a plan without waiving the requisite undue hardship finding. As could the creditor in the above-quoted hypothetical in *Hood*, USA Funds was entitled by law to expect that the bankruptcy court would not discharge a student loan without first finding undue hardship as mandated by § 523(a)(8). *Educational Credit Mgmt. Corp. v. Mersmann (In re Mersmann)*,

505 F.3d 1033, 1049 (10th Cir. 2007); *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 302 (4th Cir. 2002). *See also City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 297 (1953) ("[E]ven creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred.").

Espinosa's waiver argument was therefore rejected in one of the many cases in conflict with the Ninth Circuit:

> Hanson criticizes ECMC for sitting on its rights and failing to timely challenge the discharge order. However, student loan creditors justifiably rely on the explicit notice provisions of the Bankruptcy Code and Rules and have no reason to act until the service of a summons for an adversary proceeding apprises them that their property rights may be affected. As noted by the Supreme Court in *Mullane*, due process requires "notice and the opportunity for hearing appropriate to the nature of the case" prior to deprivation of property rights, and the creditor in this case was denied the pre-deprivation notice and hearing that are required in bankruptcies involving student loans. *Mullane*, 339 U.S. at 313, 70 S. Ct. 652.

In re Hanson, 397 F.3d 482, 486-87 (7th Cir. 2005).

II. A creditor's knowledge of a plan proposing to discharge student loan debt is not dispositive, and due process is denied, when the court orders a discharge without finding undue hardship as required by statute.

Espinosa ignores the teaching of *City of New York v. New York, New Haven & Hartford R.R.*, *supra*, that even a creditor who has actual knowledge of a bankruptcy proceeding is entitled to notice in the manner specified by law. In that case, the City had improvement liens on the debtor railroad's real estate. Pursuant to statute, the court issued an order giving creditors a deadline to file claims. Although the Bankruptcy Act provided that "[t]he judge shall require [debtors] to file in the court a list of all known creditors," that was not done. The Act further provided that "[t]he judge shall cause reasonable notice of the period in which claims may be filed, . . . by publication or otherwise." The court required the railroad to give notice by mail to specific creditors and all others who had appeared in court, and to publish the notice. Although the City's liens were known to the railroad, the City did not receive notice by mail. The City did not file a claim, and therefore the court ruled the City's liens were unenforceable.

This Court rejected the argument that the City's knowledge of the bankruptcy proceeding trumped the requirement to give notice as required by law, stating:

> Had the judge complied with the statute's mandate, it is likely that notice would have been mailed to New York City . . . .
>
> [E]ven creditors who have knowledge of a reorganization have a right to assume that the statutory "reasonable notice" will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.
>
> The statutory command for notice embodies a basic principal of justice – that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights . . . .

344 U.S. at 296-97.

Likewise here, any knowledge of the plan provision for discharge by declaration of Espinosa's student loan debt is not dispositive. USA Funds acted reasonably in waiting for notice in the form of a summons and complaint in an adversary proceeding to determine undue hardship, as required by the statute and Bankruptcy Rules. Had the bankruptcy court complied with the mandate of the statute to adjudicate the hardship issue, USA Funds would have received proper notice and would not have been denied due process. The failure to adjudicate an issue made mandatory by statute is a denial of due process. *Great American Trading Corp. v. I.C.P. Cocoa, Inc.*, 629 F.2d 1282 (7th Cir. 1980) (judgment confirming arbitration award entered without trying issue of

existence of agreement to arbitrate, as required by statute, before compelling arbitration was void).

Finally, contrary to Espinosa's assertions, the cases that conflict with the Ninth Circuit's decision are not distinguishable on the ground that the creditors were unaware of the proposed discharge of student loan debt. In all but one of the cases, the creditor received the plan proposing the discharge. *In re Banks*, *supra* at 299; *Ruehle v. Educational Credit Mgmt. Corp.* (*In re Ruehle*), 412 F.3d 679, 681 (6th Cir. 2005); *Whelton v. Educational Credit Mgmt. Corp.*, 432 F.3d 150, 152 (2d Cir. 2005); *In re Mersmann*, *supra* at 1039, 1041. In *In re Hanson*, the creditor received the petition listing only the debtor's student loan debt and, presumably, at least a summary of the plan that proposed to pay only 19% of the debt. *Supra* at 483.

III. When *Hood* is portrayed accurately, the Ninth Circuit's decision conflicts.

Espinosa attempts to avoid the fact that the result reached by the Ninth Circuit conflicts with the principles recognized in *Tennessee Student Assistance Corp. v. Hood* by misstating its holding and misapplying its language. This Court held in *Hood* that "the undue hardship determination sought . . . in this case is not a suit against a State for purposes of the Eleventh Amendment." 541 U.S. at 451. *Hood* did not hold, as Espinosa asserts, that "the acceptable form of notice for a proceeding to discharge a debt is not

limited to the issuance of a summons in an adversary proceeding" and "failure to use the adversary proceeding is not a constitutional violation." (Brief in Opp. at 11.)

Neither did *Hood* hold, as Espinosa also asserts, that "a bankruptcy court determination of dischargeability was (sic) an *in rem* proceeding." (Brief in Opp. at 12.) That "the discharge of a debt by a bankruptcy court is . . . an *in rem* proceeding" was announced by this Court long, long ago. *Hood*, 541 U.S. at 447 (citing cases dating to 1876). That well established rule was instead the rationale for *Hood's* holding that an adversary proceeding to discharge a student loan is not a suit against the state.

To merely underscore the fact that the issuance of a summons to the state did not transform the *in rem* proceeding to one *in personam*, *Hood* observed that, but for Bankruptcy Rule 7001(6), a debtor could seek a discharge by motion:

> The text of § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion, . . . which would raise no constitutional concern.

541 U.S. at 453.

Contrary to Espinosa's argument, *Hood* did not approve the use of a motion or any procedure other than an adversary proceeding to seek the discharge of a student loan. (Neither does Judge Lundin's treatise.) "[T]he *Hood* Court's suggestion, in an

entirely different context, that a debtor could proceed by motion in the absence of the Bankruptcy Rules does not authorize debtors to ignore the requirements of the Rules." *In re Hanson*, 397 F.3d at 487. Therefore, *Hood* does not permit a debtor to seek discharge of a student loan by merely including a provision to that end in a proposed Chapter 13 plan.

IV. Espinosa makes the case for granting certiorari.

Espinosa's arguments demonstrate that certiorari should be granted. Espinosa contends, repeatedly, that a reversal of the Ninth Circuit's decision would "encroach" upon the finality of discharge orders, thus "generating" litigation and "disrupting bankruptcy administration" and causing other "broad ramifications." (Brief in Opp. at 20-33.)

Yet, even without reversing the Ninth Circuit, the situation that concerns Espinosa already exists elsewhere. By virtue of the conflicting cases, what is final in the Ninth Circuit is not final in the Second, Fourth, Sixth, Seventh and Tenth Circuits. Therefore, the consequences that Espinosa fears are already possible outside the Ninth Circuit.

In short, at present the law is not nationally uniform. The only way to make it so is to grant certiorari and resolve the conflict among the circuits.

Although Espinosa argues that it is unnecessary for this Court to intervene, his argument actually

underscores the need by again noting the conflict between the Ninth and other circuits: "Some of the cases involving the discharge of student loans by a debtor proposing waiver of a hardship hearing are critical of this aspect of Chapter 13 practice. Others, including the opinion below, are not." (Brief in Opp. at 29.)

The solution to this important issue of bankruptcy practice does not lie with Congress, as Espinosa suggests. Congress has already made it abundantly clear that student loans are not dischargeable absent proof of undue hardship. It is, instead, up to the courts to apply that mandate uniformly.

However, as Espinosa notes, the courts disagree on what is proper practice. (*Id.*) Therefore, that the bankruptcy courts have tools for dealing with improper practice does not alter the fact that what is proper in the Ninth Circuit is improper in five other circuits.

Neither is the solution, as Espinosa suggests, to leave the parties in each case to their own devices. Instead of the various forms of discharge by declaration illustrated by the cases (now euphemistically recharacterized after the fact by Espinosa as a "proposal for waiver"), a proper and uniform procedure already exists in the Rules. Namely, the debtor commences an adversary proceeding and gives proper notice to the creditor, who then decides, based upon

the usual legal and business considerations, whether or not to contest.

Respectfully submitted,

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UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOZA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN SUPPORT OF PETITIONER FOR *AMICUS CURIAE* EDUCATIONAL CREDIT MANAGEMENT CORPORATION

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Educational Credit Management Corporation, as *amicus curiae*, respectfully files this brief in support of Petitioner United Student Aid Fund's Petition for a Writ of Certiorari.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Educational Credit Management Corporation (ECMC) is a private, nonprofit corporation and guaranty agency in the Federal Family Education Loan (FFEL) Program, one of two federally-backed student loan programs.[2] As of September 30, 2007, the total financial interest at stake in the two federal student loan programs approached $500 billion.[3]

ECMC guarantees or services approximately 65% of the total FFEL Program loan volume currently in bankruptcy. In the Ninth Circuit alone, ECMC manages the accounts of approximately 5,800 Chapter 13 bankruptcy debtors who have FFEL student loans,

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief by *amicus curiae*, and their consent letters are on file with the Clerk's Office. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

[2] The Federal Government operates two student loan programs: The Federal Family Education Loan (FFEL) Program and the William D. Ford Federal Direct Loan (DL) Program. Both programs are regulated by the United States Department of Education (ED) and are federally-insured.

[3] There is approximately $363 billion of student loans in the FFEL Program and $107.2 billion in the DL Program.

totaling over $135 million. ECMC also manages an additional 50,200 Chapter 13 bankruptcy cases involving FFEL Program loans, representing more than $1 billion in outstanding balances across the rest of the United States.[4]

The federal fisc at stake here is paramount. Since its inception in 1965, the FFEL Program has provided $735 billion in loans to postsecondary students and their parents. In the 2007-08 academic year, the FFEL Program served 6.5 million students and their parents, lending them approximately $54.7 billion. Between 1965 and 2004, the percentage of adults holding bachelor degrees more than tripled.

To ensure the integrity of the federal student loan program, Congress specifically excepted student loan debt from bankruptcy discharge absent proof by the debtor of undue hardship of the debtor and debtor's dependents. Over the last five decades, Congress has increasingly tightened the standard that debtors must prove to be relieved from repaying their student loans. Thus, as a federal guaranty agency, ECMC plays a vital, integral role in the student loan program and has an obligation to comply with Congress's mandate to maintain the viability of the federal student loan program.

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[4] These figures do not include any student loan accounts serviced and monitored by the United States Department of Education.

SUMMARY OF ARGUMENT

The circuit courts of appeal are sharply divided on whether debtors may discharge their student loan debt through the Chapter 13 bankruptcy plan confirmation process. Because entrenched disagreement in the courts of appeal has caused confusion and disuniformity of rulings in cases based on identical facts, certiorari is warranted to provide guidance for lower courts.

The Fourth, Sixth, and Seventh Circuits have held that confirmed plans with discharge-by-declaration provisions have no preclusive effect because they violate creditors' due process rights. The Second and Tenth Circuits prohibit debtors from discharging student loan debt through their Chapter 13 plans because this practice violates the bankruptcy code, and, therefore, the confirmation orders have no preclusive effect. The Ninth Circuit's *Espinosa*[5] decision outright rejected both of these analyses.

The Ninth Circuit's *Espinosa* decision is a legal charade. It stands against the universe of this Court's precedent, other circuits' decisions, and congressional mandate for the shocking proposition that debtors may discharge their nondischargeable student loan debt simply by hiding magic language in their Chapter 13 bankruptcy plans. *Espinosa* unjustifiably sets a trap for unwary courts, trustees, and creditors. Moreover, it reduces the bankruptcy process to gamesmanship and condones and

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[5] *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193 (9th Cir. 2008)

encourages unethical, sanctionable practices by debtors' attorneys.

Allowing *Espinosa* to be the law—in the Ninth Circuit alone—has significant financial and practical consequences for the federal government, states government, student loan industry, and the processes of bankruptcy courts. It also sanctions a dangerous path for debtors to discharge other nondischargeable debts like child support, maintenance, tax, personal injury, and wrongful death through their Chapter 13 plans.

Only this Court can clarify its due process precedent, resolve the clear conflict between circuits, ensure the uniform application of the Bankruptcy Code, and protect the federal fisc and other socially-based, specially-excepted nondischargeable debt. Accordingly, ECMC urges this Court to grant USA Funds' Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Two early cases from the Tenth and Ninth Circuits initiated a decade of gamesmanship among debtors' counsel, bankruptcy courts, Chapter 13 trustees, and creditors' counsel. Four other circuits have specifically disavowed these opinions as a fundamental violation of due process, the statutory requirements of the Bankruptcy Code, and the requirements of res judicata.

In 2007, the Tenth Circuit repudiated what had been the initial decision in this line of cases, realizing it could no longer defend this practice. Although *Espinosa* squarely presented the Ninth

Circuit with the opportunity to right its earlier wrongs, the Ninth Circuit instead reasserted the requirement that bankruptcy courts engage in the procedural nonsense that allows debtors to include in a bankruptcy plan whatever they can get away with. When given a chance to review its opinion *en banc*, the court declined and thereby punted the issue directly to this Court.

I. *Espinosa* Created a Decisive Split: Five Circuits Have Banned Discharge-by-Declaration of Student Loan Debt through a Chapter 13 Plan, But the Ninth Circuit Permits It.

A. The Fourth, Sixth, and Seventh Circuits Maintain That Discharge-by-Declaration Violates Creditors' Due Process.

Three Circuit Courts of Appeal have held that discharge-by-declaration violates student loan creditors' due process rights. First, the Fourth Circuit held that "[w]here the Bankruptcy Code and Bankruptcy Rules specify the notice required prior to entry of an order, due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect." *Banks v. Sallie Mae Serv. Corp. (In re Banks)*, 299 F.3d 296, 302 (4th Cir. 2002).

Following the Fourth Circuit's lead, the Seventh Circuit also held that discharge-by-declaration provisions are not entitled to preclusive effect because they violate a student loan creditor's due process rights. *Hanson v. Educ. Credit Mgmt.*

Corp. (In re Hanson), 397 F.3d 482, 487 (7th Cir. 2005) ("[D]ue process entitles creditors to the heightened notice provided for by the Bankruptcy Code and Rules, and the dictates of due process trump policy arguments about finality.") (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Next, the Sixth Circuit joined the "evolving majority view that a purported 'discharge by declaration' of student loan debt is not only invalid but void" because it violates a student loan creditor's due process rights. *Ruehle v. Educ. Credit Mgmt Corp. (In re Ruehle)*, 412 F.3d 679, 684 (6th Cir. 2005). The Sixth Circuit considered, and explicitly rejected, the finality rationale used by the Ninth Circuit, stating that this approach "ignores the clear intent of Congress and the Judicial Conference" to "require an adversary proceeding" and "it enriches and emboldens those who take what is not theirs and legitimizes it with court sanction." *Id.* (quoting and adopting the bankruptcy court's "astute analysis in this case").

On indistinguishable facts, only the Ninth Circuit disagrees. Certiorari is necessary so this Court may resolve this circuit split and provide guidance regarding its due process precedent and the intersection of the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code.

1. *This Court has specifically delineated the process that is due.*

Pursuant to 28 U.S.C. § 2075, this Court is mandated "to prescribe by general rules, the forms of

process, writs, pleadings, and motions, and the practice and procedure in cases under title 11." In promulgating the Federal Rules of Bankruptcy Procedure, this Court specifically delineated the process that is due to student loan creditors before student loan debt may be discharged. It is this specific process—established by this Court—that the Ninth Circuit ignores, without legal or factual justification.

a. Mullane *establishes the process that is due.*

More than five decades ago, this Court held that due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing ***appropriate to the nature of the case.***" *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Critically, the Ninth Circuit misses or improperly dismisses this key phrase: "appropriate to the nature of the case." To accord finality to the confirmation order in the bankruptcy case below, *Mullane* requires that the notice be

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> ...
>
> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one

> desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id. at 315.

Significantly, Congress expressly incorporated the *Mullane* standard in the Bankruptcy Code:

> In this title—
>
> (1) "after notice and a hearing", or a similar phrase—
>
> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances;

11 U.S.C. § 102 (1). This provision, read together with 11 U.S.C. § 523(a)(8), leaves little doubt that the process due in student loan discharge matters is "heightened" to afford "greater procedural protections" to student loan creditors. *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 451 (2004) (Rehnquist, C.J.) ("Because student loan debts are not automatically dischargeable...the Federal Rules of Bankruptcy Procedure provide creditors greater procedural protection.")

b. Hood *prescribes precisely which bankruptcy rules must be followed to satisfy* Mullane*'s due process requirements in the student loan discharge context.*

In *Tenn. Student Assistance Corp. v. Hood*, Chief Justice Rehnquist unequivocally stated that, "unless the ***debtor affirmatively*** secures a hardship determination, the discharge order will not include a student loan debt." *Hood*, 541 U.S. at 449 (emphasis added) (Rehnquist, C.J.) (citing 11 U.S.C. § 523(a)(8)). As Chief Justice Rehnquist explained, § 523(a)(8) is "self-executing," requiring the debtor—not the creditor—to seek the dischargeability determination through an adversary proceeding as required by Fed. R. Bankr. P. 7001(6). *Hood*, 541 U.S. at 450.

Further, Chief Justice Rehnquist noted that, ***absent Rule 7001(6)***, debtors could affirmatively seek discharge of their student loan debt by motion under Rule 9014 without raising constitutional concerns. *Hood*, 541 U.S. at 453; *but see* Fed. R. Bankr. P. 9014(b) (requiring that Rule 9014 *motion* "shall be served in the manner provided for service of a summons and complaint under Rule 7004"). Under 7001(6), debtors must initiate an adversary, file a complaint, and serve a summons on the student loan creditor pursuant to Fed. R. Bankr. P. 7004. *Hood*, 541 U.S. at 450-51.

The notice provided by Espinosa to USA Funds was not "appropriate" given the unique "nature of the [bankruptcy] case" in student loan discharge matters. Burying illegal discharge language in a Chapter 13 plan and sending general notice of the plan to a

payment lockbox address cannot be construed—at any level—as notice "appropriate to the nature of the case."

2. The Ninth Circuit's conclusion that notice under Fed. R. Bankr. P. 2002 satisfies a creditor's due process is contrary to this Court's decisions in *Mullane* and *Hood*.

Long ago, this Court recognized that "[e]ven creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953). *Hood* specifically outlined what rules debtors must follow to satisfy the "greater procedural protection" student loan creditors enjoy in bankruptcy settings. *Hood*, 541 U.S. at 550-52. There is no dispute that the only notice Espinosa provided was under Fed. R. Bankr. P. 2002.

The Fourth Circuit explained the rationale behind the "heightened notice" requirement in student loan discharge cases:

> Fed. R. Bankr. P. 2002(b) does not require specific notice of plan provisions affecting a particular creditor, nor does it require the notice to be served in any particular manner or upon any particular person. "[T]here are many aspects to and actions that may be taken in bankruptcy cases which affect the general administration of

> the case and all creditors generally, but none specifically." Generally, such matters require "notice," but not service of process. When the rights of specific parties become an issue, however, service of the initiating motion or objection on the affected party is required. Fed. R. Bankr. P. 7003, 7004. Mailing the proposed plans, the hearing notice, and the confirmation order satisfies the "notice" requirement under Rule 2002, but not the service and summons requirements of Rule 7004.

Banks, 299 F.3d at 301 (internal citation omitted); *see also Ruehle*, 412 F.3d at 684; *Hanson*, 397 F.3d at 486-87; *Repp v. Educ. Credit Mgmt. Corp. (In re Repp)*, 307 B.R. 144, 152-56 (B.A.P. 9th Cir. 2004) (holding that "notice less than that which results from compliance with Rule 7004's requirement for serving a complaint on a corporate defendant flunks due process").

Espinosa's assertion that the plan itself, which was mailed by the court to a general post office box, or the Trustee's general warning letter was sufficient notice falls wide off the *Mullane* mark. *See Espinosa*, 553 F.3d at 1200, n.4. That Espinosa did not hide the language in a footnote or put it in small print is not the relevant consideration under *Mullane*. That USA Funds received general notice or that "nobody-in-particular" at USA Funds may have received notice is also not the specific, appropriate notice this Court, the Bankruptcy Code, or the Bankruptcy Rules require.

Here, the process chosen by Espinosa was substantially less likely to "bring home notice" than the "feasible," "customary," and *legally required* alternative: summons, complaint, and delivery to a registered agent. *See Repp*, 307 B.R. at 149 ("The nub of the problem . . . is that the method chosen for notice was calculated to *minimize* the chance that it would come to the attention of persons in the position to make litigation decisions for the creditor.").

If Espinosa had actually *desired* to notify USA Funds of his intent to discharge his student loan, he could easily have served the corporate officer or registered agent of the student loan creditors with a summons and complaint as required by the Bankruptcy Rules. Instead, he simply mailed the Plan to USA Funds, addressed to nobody in particular at a post office box address. This practice places the student loan creditor in an unfair "Catch 22":

> It is black-letter law that [student loan creditors] are not required to respond per Rule 7012 until they have been "duly served" in accordance with Rule 7004 and need not fear a default judgment if they have not been "duly served." Yet—Catch-22—if they do not respond to notice of a plan mailed in accordance with Rule 2002 to nobody-in-particular at a payment lockbox, they stand to lose their rights by default to an "illegal" plan provision that they—double Catch-22—are entitled to expect the court, in the exercise of its independent duty, to reject in the first

place.

Repp, 307 B.R. at 153.

The form of notice Espinosa used was not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. In this case, Espinosa never issued a summons or complaint and the issue of undue hardship was never litigated.[6]

While not every procedural rule violation offends due process, *Hood*'s explicit recitation of procedural requirements in student loan discharge matters is not mere *dicta* as Espinosa argued below. Rather, *Hood*'s discussion about the procedural rules at issue here is fundamental to all of the Bankruptcy Code, whether the issue is sovereign immunity or student loan discharge.[7] 11 U.S.C. § 102 embodies

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[6] Significantly, Espinosa did not attempt to plead or prove in his plan that payment of the full amount of his student loan debt would constitute an "undue hardship."

[7] Indeed, both Judge Kozinski and Judge Lundin appear to misread *Hood* by suggesting that, in the student loan context, *Hood* narrowly stands for the proposition that "an adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to an adjudication of student loan discharge." *Espinosa*, 553 F.3d at 1202. Actually, *Hood*'s point is broader and simpler and certainly does not "undermine[] Fund's argument." In *Hood*, Tennessee Student Assistance Corporation (TSAC), a state-based guaranty agency, invoked sovereign immunity from the student loan discharge action. This Court disagreed that the discharge action was an affront to TSAC's sovereignty on the ground that the discharge action was an *in rem* action and the court's jurisdiction was premised on the *res* not the person or the State. Thus, the

the *Mullane* standard for notice. *Hood* reaffirms the specific notice "appropriate" in student loan discharge matters as required by § 102 and the Bankruptcy Rules. Under *Hood*, the appropriate notice is a "heightened notice," to afford a "greater procedural protection" to effect Congress's explicit intent to prevent discharge of student loan debt, except upon proof of undue hardship under § 523(a)(8). *Hood*, 541 U.S. at 451.

Given the circuits' conflicting and irreconcilable interpretations of this Court's due process precedent, certiorari is necessary to clarify whether a blatant violation of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure violates a student loan creditor's due process rights.

B. The Ninth Circuit Explicitly Rejects the Second and Tenth Circuits Holding that Chapter 13 Confirmation Orders Containing Discharge-by-Declaration Provisions Have No Preclusive Effect.

In its wholesale rejection of this Court's precedent and the creditor's due process concerns, the lower court relied primarily on its earlier plan language decision, *Great Lakes Higher Educ. Corp. v. Pardee* (*In re Pardee*), 193 F.3d 1083 (9th Cir. 1999).

"form" of pleading by which the sovereign was brought into the proceeding, *i.e.*, a Summons and Complaint, did not change the fact that the bankruptcy proceeding was an *in rem* proceeding, and, therefore, the "undue hardship determination . . . is not a suit against a State for purposes of the Eleventh Amendment." *Hood*, 541 U.S. at 451 & n.5.

Although *Andersen*,[8] the early case that *Pardee* relied on had been reversed by the Tenth Circuit, the Ninth Circuit, refusing to sit *en banc*, determined that *Pardee* and the overruled *Andersen* were still the right approach. The Ninth Circuit concluded it had not "strayed off course" and reaffirmed its *Pardee* decision, holding that

> *Pardee* and *Andersen* stand soundly for the better-reasoned principle that notice of how the Chapter 13 plan affects creditors' rights is all that the Constitution, the Bankrutpcy Code and the Bankruptcy Rules require to bind creditors to the provisions of a confirmed plan under § 1327(a).

Espinosa, 553 F.3d at 1202. The Ninth Circuit's decision directly contradicts precedent in the Second and Tenth Circuits.

1. *Declaration-by-discharge provisions violate statutory principles.*

Both the Second and the Tenth Circuits have expressly rejected the Ninth Circuit's reliance on the preclusive effect of 11 U.S.C. § 1327(a). *Educ. Credit Mgmt Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007) (en banc); *Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 155-56 (2d Cir. 2005). While acknowledging that 11 U.S.C. § 1327(a) generally binds a non-objecting party, the Second and

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[8] *See Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999), *overruled by Educ. Credit Mgmt Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007) (en banc).

Tenth Circuits held that it cannot have preclusive effect in orders entered in violation of the rest of the Bankruptcy Code. *See Mersmann*, 505 F.3d at 1047 ("Discharge-by-declaration [in the context of student loans] deserves no preclusive effect under § 1327(a) because it fails to comport with the provisions of the Bankruptcy Code and Rules governing discharge."); *Whelton*, 432 F.3d at 154-55 ("[T]he Bankruptcy Court lacked the authority to grant a discharge of [the debtor's] student loan debt through the ordinary confirmation process.").

In a footnote, the Ninth Circuit dismisses the import of the Tenth Circuit's "statutory" ground because "it proves something that is both obvious and beside the point." *Espinosa*, 553 F.3d at 1199, n.3. While *Mersmann*'s holding is obvious, *it is also the "point"* the Ninth Circuit missed.

In concluding discharge-by-declaration provisions are not entitled to preclusive effect, the Tenth Circuit relied, in part, on the inherent statutory conflict between 11 U.S.C. § 1327(a) and 11 U.S.C. § 1328(a)(2). In overruling its earlier *Andersen* case, the Tenth Circuit noted that "[g]iving preclusive effect to the [general] discharge-by-declaration through § 1327(a) renders [the specific exception] of § 1328(a)(2) nugatory." *Mersmann*, 505 F.3d at 1048. Statutory construction principles require that, when general and specific statutory provisions contradict, the "specific pronouncement [of § 1328(a)(2)] must be read as limiting § 1327(a) broad res judicata effect." *Id.* In other words, the specific language of the § 1328 discharge order that specifically excepts student loan debt from

bankruptcy discharge limits the broader reach of the confirmation order that binds creditors who fail to object to illegal plan language.

The Tenth Circuit also noted that discharge-by-declaration language violates 11 U.S.C. § 1325's requirement that Chapter 13 plans comply with the Bankruptcy Code. Therefore, allowing a plan with illegal language to be confirmed "violates the general maxim that the Bankruptcy Code and Rules 'be construed so that their provisions are harmonious with each other.'" *Id.* The Tenth Circuit further explained that "[t]o give preclusive effect to a confirmation order based solely on § 1327(a) deprives the Bankruptcy Code and Rules of a coherent reading, fails to give full effect to all of their provision, and undermines the clear will of Congress." *Id.*

2. *A confirmation order is not res judicata to issues that were not actually litigated.*

The Second and Tenth Circuits also rely on a res judicata analysis to conclude that a confirmation order has no preclusive effect on an issue that could not or should not have been litigated at the confirmation hearing. As a general matter, this Court has stated that res judicata will be invoked when there is (1) an adjudication on the merits, (2) the parties are identical or in privity, and (3) the claims were or could have been raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1989); *see also Mersmann*, 505 F.3d at 1049; *Whelton*, 432 F.3d at 154-55.

Discharge-by-declaration provisions fail res judicata elements for at least two reasons: First, failure to provide specific notice under Fed. R. Bankr. P. 7004 effectively denies the student loan creditor a full and fair opportunity to litigate the claim. *Mersmann*, 505 F.3d at 1049. Second, plan confirmation is a narrow forum, limited to confirming those plans specified in 11 U.S.C. § 1325(a)(1) ("court shall confirm a plan if the plan complies with the provisions of this chapter").

Student loan debt is specifically excepted from the discharge under 11 U.S.C. § 1328(c) unless the debtor makes "a specific factual showing" of undue hardship. *Whelton*, 432 F.3d at 155. Inserting illegal language into a Chapter 13 plan violates these provisions because undue hardship cannot and is not proved through the Chapter 13 plan itself. Moreover, in the plan confirmation process, the court never actually adjudicates the issue of undue hardship on the merits. *Mersmann*, 505 F.3d at 1050; *Whelton*, 432 F.3d at 155. Under the bankruptcy code, the dischargeability of student loan debt cannot be litigated at the plan confirmation stage; plan provisions purporting to discharge by declaration are "mere trespassers" and cannot and do not enjoy the statutory res judicata effect of § 1327. *Educ. Credit Mgmt. Corp. v. Whelton*, (*In re Whelton*), 299 B.R. 306, 315 (Bankr. Vt. 2003) ("The Confirmation Order enforces only those provisions of the Plan that are required or permitted to be there by the Bankruptcy Code and cannot be usurped to validate or enforce provisions that were never properly lodged in the Plan.")

The Ninth Circuit, however, considered and rejected this res judicata analysis, stating that the *Mersmann* and *Whelton* decisions do not offer any persuasive reasons why the discharge-by-declaration provisions should not be given full preclusive effect. *Espinosa*, 553 F.3d at 1200. Foremost, the Ninth Circuit rejected the application of res judicata principles because a "discharge injunction does not operate by way of res judicata," but is "an equitable remedy." *Id.*

Even following the Ninth Circuit's fractured analysis to its conclusion, however, violates this Court's precedent. That is, even if res judicata principles do not apply because a discharge injunction is an equitable remedy, that equitable remedy is still confined to the Bankruptcy Code. As this Court stated in *Norwest Bank Worthington v. Ahlers*, "[w]hatever equitable powers remain in the Bankruptcy Courts must and can only be exercised within the confines of the Bankruptcy Code. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206-07 (1988). Thus, a discharge injunction cannot be exercised in contravention of another section of the Code. *Id.*

Espinosa erred by continuing to follow the *Pardee* rationale, a case that has become an outlier. *Pardee* cannot stand on res judicata grounds because the issue of undue hardship—or even the broader issue of the dischargeability of student loan debt of any sort—cannot, should not, and was not litigated at the confirmation hearing. This irreconcilable circuit split is based primarily on disagreeing interpretations of the Bankruptcy Code and Rules

and this Court's precedent, resulting in the inconsistent application of bankruptcy law. Without resolution by this Court, lower courts will continue to disagree over whether discharge-by-declaration provisions are entitled to preclusive effect. As such, this Court should grant certiorari.

II. The Ninth Circuit's Decision Paves the Path for Debtors to Discharge Child Support, Maintenance, Tax Debt, and Wrongful Death Judgments Through Chapter 13 Bankruptcies.

The disagreement in the Circuits over whether the creditor of a presumptively nondischargeable debt is entitled to the level of process prescribed in the Federal Bankruptcy Rules of Procedure prior to discharge is particularly significant because it could easily extend beyond the context of student loan "undue hardship" cases into other presumptively nondischargeable debts. The danger of allowing *Espinosa* to stand is immeasurable. Under the lower court's rationale, debts such as child support, maintenance, tax debt, court-ordered restitution, criminal fines and penalties, and others would all be susceptible to discharge via plan language in the Ninth Circuit. *See generally* 11 U.S.C. §§ 523(a); 1328(a).

This result directly contravenes the important public policy choices Congress made in declaring these debts presumptively nondischargeable. *See Cohen v. De La Cruz*, 523 U.S. 213, 222 (1998) ("The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress 'that the creditors'

interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start.") (*citing Grogan v. Garner*, 498 U.S. 279, 287 (1991)). *Espinosa* allows debtors in the Ninth Circuit to circumvent rules promulgated by this Court pertaining to notice and service in initiating dischargeability proceedings for other types of nondischargeable debt. It also undermines the stability that these rules are meant to provide, Congress's intent that these debts be nondischargeable in bankruptcy proceedings, and the uniform application of bankruptcy laws.

III. The Ninth Circuit's Decision Makes a Mockery of Bankruptcy Process and Encourages Unethical Conduct.

Even as limited to the student loan context, the decision below will have an enormous impact on the uniform application of the Bankruptcy Code, the student loan industry, the federal fisc, and the efficiency of bankruptcy courts' process. In giving preclusive effect to discharge-by-declaration plan language, *Espinosa* encourages every student loan debtor in the Ninth Circuit to attempt it. Indeed, it would cost nothing for the debtor to insert an additional paragraph in a Chapter 13 plan purporting to discharge student loans. Debtors and their counsel would not even be subject to sanctions if they modified their plans within 21 days of the sanction motion, even though, as the Ninth Circuit acknowledges, the provision is undoubtedly illegal. Fed. R. Bankr. 9011; *see also Espinosa*, 553 F.3d at 1202. Bankruptcy attorneys would face an ethical conundrum between zealous advocacy on behalf of

their clients and ensuring that their clients meet the elements of an "undue hardship" in good faith. *See Mersmann*, 505 F.3d at 1050 ("Bankruptcy attorneys may be caught on the horns of a dilemma between aggressively pursuing a discharge-by-declaration on behalf of clients and ensuring that their clients meet the elements of an 'undue hardship' in good faith.").

In contrast, student loan creditors would be required to hire local counsel to file objections to every Chapter 13 plan in which a student loan is involved. The attorney fees and costs incurred by creditors would be extraordinary. The system would be clogged with plan objections, withdrawals of motions to modify, and sanctions requests. Yet the bankruptcy system would enjoy no benefit or gain from this meaningless procedure.

This futile process will only inundate the bankruptcy courts with pointless objections that would always be successful because there is no question that student loan creditors are entitled under the Bankruptcy Code and Rules to an adversary proceeding to determine undue hardship, as the lower court acknowledged. *See Espinosa*, 553 F.3d at 1202 (stating that if the creditor were to object, the bankruptcy court would be required to force the debtor to initiate an adversary proceeding and amend his plan).

Espinosa will cause bankruptcy courts and creditors to be overly burdened in a futile exercise of entertaining and granting countless objections to confirmation. Even within the Ninth Circuit, some loans will be discharged by use of plan language. Some loans will not. Some attempts will be caught by

the trustee. Some will be caught by the court. Some will be held to their statutory burden of proof of establishing undue hardship. Some will not have to prove anything. The better outcome would be to prohibit this practice rather than rewarding it.

Without a definitive resolution, the Bankruptcy Code and Rules, designed to promote uniform treatment of like situations, will instead spawn inconsistent results. This Court's review is warranted to prevent such disparity.

CONCLUSION

Only this Court can say whether the Ninth Circuit is wrong to stand against the universe of this Court's precedent, congressional mandate, and a decade worth of contrary circuit-level caselaw. Unless this Court resolves the matter, the certain consequences will be the rise of gamesmanship, the mockery of bankruptcy process, and harm to the federal fisc. To countenance the practice of discharge-by-declaration, at any level, erodes the fundamental processes that embody this Court's jurisprudence. This Court should grant USA Funds' Petition for a Writ of Certiorari to restore certainty and consistency to the bankruptcy process and uniformity in the application of the Bankruptcy Code.

Respectfully submitted,

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IN THE

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UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

FRANCISCO J. ESPINOSA,
Respondent.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC. *ET AL.* IN SUPPORT OF PETITIONER

(Additional *Amici Curiae* on Inside Cover)

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INTEREST OF *AMICI CURIAE*

The *amici curiae* filing this brief are the National Council of Higher Education Loan Programs, Inc. ("NCHELP"); Great Lakes Higher Education Corporation and its affiliates, Great Lakes Higher Education Guaranty Corporation, Great Lakes Educational Loan Services, Inc., Northstar Guarantee Inc. and Education Assistance Corporation ("Great Lakes"); the New Mexico Educational Assistance Foundation and the New Mexico Student Loan Guarantee Corporation ("New Mexico Student Loans"); the Pennsylvania Higher Education Assistance Agency ("PHEAA"); the Rhode Island Higher Education Assistance Authority ("RIHEAA"); the Texas Guaranteed Student Loan Corporation ("TGSLC"); and the Utah Higher Education Assistance Authority ("UHEAA") (collectively, the "*amici*").[1]

NCHELP is the largest national trade association representing student loan organizations. It represents a nationwide network of guaranty agencies, secondary markets, lenders, loan servicers,

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. The parties have consented to the filing of this brief. Consent letters from the attorneys for Petitioner and Respondent are being filed concurrently with this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

collectors, schools and other organizations that provide financial assistance to millions of American students and their families each year through the Federal Family Education Loan ("FFEL") Program. The FFEL Program is a guaranteed loan program that, since its establishment by Congress as part of the Higher Education Act of 1965, which is now codified at 20 U.S.C. § 1071 *et seq.*, has helped over 60 million students obtain a postsecondary education.

Great Lakes, New Mexico Student Loans, PHEAA, RIHEAA, TGSLC and UHEAA are representative of both large and small guarantors. Most also service loans for lenders. Together, they serve millions of students and thousands of postsecondary schools across the country and manage billions of dollars in FFEL Program loans.

As loan guarantors, these *amici* are integral to the administration of the FFEL Program. Loan guaranty agencies are state or private nonprofit organizations that have an agreement with the Secretary of the United States Department of Education (the "Department") under which they administer a loan guarantee program under the Higher Education Act pursuant to 20 U.S.C. §§ 1078(b) and (c).

These guaranty agencies play a lead role in administering many aspects of the FFEL Program. Under the FFEL Program, they offer counseling to borrowers, and assist borrowers in obtaining deferments, forbearances and income-based

repayment arrangements. Of particular importance, they expend significant effort and cost helping borrowers avoid default and bankruptcy and rehabilitating defaulted loans. When a FFEL Program loan goes into default or a borrower files for bankruptcy, the guaranty agencies purchase the loan from the lender. They then manage the loan account for the benefit of the United States taxpayers.

SUMMARY OF ARGUMENT

The *amici* submit this brief as *amici curiae* in support of a petition for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit, to review its decision in *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193 (9th Cir. 2008) ("Espinosa").

The Ninth Circuit's decision in *Espinosa* upsets well-settled procedural safeguards in bankruptcy designed to protect the integrity of the FFEL Program. Those safeguards are clearly expressed by Congress in the Bankruptcy Code, which makes federal student loan obligations presumptively non-dischargeable. These safeguards were recognized in this Court's decision in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 449-452 (2004), stating that a debtor in bankruptcy is required to file an adversary proceeding in order to discharge his student loan debt as an "undue hardship" pursuant to 11 U.S.C. § 523(a)(8).

In *Espinosa*, the Ninth Circuit has decided an important question of federal bankruptcy law in a way that conflicts with this Court's ruling in *Hood* and with decisions of the Second, Fourth, Sixth, Seventh and Tenth Circuits.

This Court should resolve now the upheaval created by the *Espinosa* decision, because it has a tremendous, fundamental impact on (1) the operations of the FFEL Program lenders and their servicers, and of guaranty agencies, across the United States; and (2) the federal fiscal interest in federal student loans.

ARGUMENT

The Ninth Circuit's decision in *Espinosa* greatly impacts the fundamental scope of procedural safeguards afforded to lenders and guarantors in a bankruptcy action brought by a borrower of a FFEL Program loan. The Ninth Circuit adopted a rule allowing discharge-by-declaration, *i.e.*, discharge of student loan debt in bankruptcy through a declaration of discharge in a Chapter 13 plan, if the creditor does not object to the plan, without requiring service of a summons and complaint and without proof of an "undue hardship" on the debtor and the debtor's dependents in an adversary proceeding, all as required by 11 U.S.C. § 523(a)(8) and Federal Rule of Bankruptcy Procedure 7001(6).

Because the Ninth Circuit's decision conflicts with this Court's ruling in *Hood* and with the decisions of five other Courts of Appeals, there are

now differing interpretations of the Bankruptcy Code in different parts of the country, which causes great confusion for FFEL Program lenders and guarantors participating in this national student loan program.

Also, there is further uncertainty even in the Ninth Circuit. Since *Espinosa* conflicts with *Hood*, there is at least a substantial probability that the *Espinosa* decision will be overturned. This confusion and uncertainty will not quickly abate unless and until this Court considers the issues raised in *Espinosa*.

The uncertainty has and will have an enormous practical impact on the business of FFEL Program participants. Lenders and guaranty agencies must take certain actions when the borrower of a FFEL Program loan files a Chapter 7 or Chapter 13 bankruptcy. Until now, they have been able to take comfort that the ultimate obligation of the borrower would not be discharged unless the borrower commenced an adversary proceeding for discharge based on undue hardship. For this reason, they have different—and more rigorous—procedures for evaluating and responding to discharge petitions versus normal proposed Chapter 13 plans.

Guaranty agencies cannot now confidently rely on the scope of protection to be afforded to them in bankruptcy. Thus, the *Espinosa* decision will adversely affect the agencies' bankruptcy servicing

operations unless and until this Court resolves the uncertainty.

The *Espinosa* decision will require the agencies to drastically restructure their bankruptcy litigation procedures. They will be forced now to hire local counsel, enter an appearance and file an objection to each and every proposed Chapter 13 plan that seeks to discharge federal student loan obligations. The agencies will have to hire additional staff to carefully review and respond to each proposed Chapter 13 plan, at substantial cost to the agencies.

The implications of *Espinosa* are particularly problematic given the nature of the borrower population. Student loan borrowers are highly mobile; they commonly move into the states comprising the Ninth Circuit. Thus, *Espinosa* will affect lenders and their servicers, and guaranty agencies, across the country, regardless of whether they guaranty FFEL Program loans nationally or only for students going to schools in a particular state, or for that state's residents going to schools throughout the country.

A loan guaranteed by RIHEAA, for instance, to a student who attended a school in Rhode Island but who has since moved to California, may be subject to discharge-by-declaration in a personal bankruptcy case in California. RIHEAA's geographic location outside of the Ninth Circuit will not insulate it from the impact of the *Espinosa*

decision. The negative repercussions of *Espinosa* will be felt by all guaranty agencies nationwide.

Espinosa also will harm the federal fiscal interest in FFEL Program loans. The uncertainty created by the *Espinosa* decision undoubtedly will result in a large and sudden increase in the amount of non-dischargeable student loan debt that is improperly discharged. Due to the lack of an adversary proceeding and individual notice to the agencies by service of a summons and complaint, as required by the Federal Rules of Bankruptcy Procedure, the issue of discharge will not be brought to an appropriate level within the agencies for evaluation. The increased amount of improperly discharged FFEL Program loan obligations will be an expensive cost to the Department, which reinsures discharged FFEL Program loans. Ultimately, these costs will be borne by the United States taxpayers.

CONCLUSION

The Ninth Circuit's decision in *Espinosa* creates uncertainty throughout the FFEL Program, because it conflicts with this Court's established precedent and creates differing standards between the Ninth Circuit and other Circuits. This uncertainty undermines the important public interests balanced by a reliable, affordable and predictable federal educational loan system. For these reasons, *amici curiae* NCHELP, Great Lakes, New Mexico Student Loans, PHEAA, RIHEAA, TGSLC and UHEAA respectfully request that the

Court issue a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit in this case, and clarify this very important area of federal bankruptcy law.

Respectfully submitted,

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Brief of the States of Oregon, Alaska, Hawaii, Michigan, Missouri, Nevada, Ohio, Tennessee, Utah, Washington and Wyoming

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QUESTIONS PRESENTED

Section 523(a)(8) of the Bankruptcy Code provides that student loans are nondischargeable unless there is an affirmative showing by the debtor that repayment of the loan would impose an undue hardship. In turn, Rule 7001(6) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rule") provides that an action to determine the dischargeability of a debt must be brought by way of an adversary proceeding (a separate proceeding within a bankruptcy case that is litigated directly between the debtor and the other party). Finally, Bankruptcy Rule 7004 provides that an adversary proceeding is to be initiated by the service of a summons and complaint on the defendant party. The questions presented are:

1. Where a debtor ignores the requirements of Bankruptcy Rules 7001(6) and 7004 and purports to discharge a student debt by inclusion of language in a Chapter 13 plan, has the debtor satisfied the requirements of *Mullane v. Cent. Hanover Bank & Trust Co.*,, 339 U.S. 306 (1950) – that due process requires that a party must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections?"

2. If the debtor has failed to satisfy those due process requirements by failing to initiate an adversary proceeding and to serve the student loan creditor with a summons and complaint, is the plan confirmation order void in that respect, is the order void, or may the bankruptcy court nevertheless presume that

the party agrees with the proposed action such that it can be bound by *res judicata* to an order approving that action?

3. Does the bankruptcy court have authority to approve a plan that provides for actions that the Bankruptcy Rules state must be taken by adversary action?

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STATEMENT OF AMICI INTEREST

The Amici states are parties that appear as secured and unsecured creditors in bankruptcy cases. They may enforce student loans and, as such, are directly affected by the Ninth Circuit's holding. The logic of the analysis below, though, extends far beyond student loans to any discharge exception in Chapter 13 which, since the 2005 amendments to the Bankruptcy Code, now include, *inter alia*, those arising from late or non-filed tax returns, from taxes a debtor sought to fraudulently evade, from debts that the debtor failed to timely schedule, from domestic support obligations, from drunk driving judgments, and from criminal sentences.

Those debts are excepted from discharge under Sections 523 and 1328(a) without need for action by the creditor. Taken together, the Bankruptcy Code and Rules provide that the determination of whether a particular debt falls into those exceptions must be made by a separate proceeding, directed at and naming a specific creditor, in a complaint with allegations sufficient to satisfy Bankruptcy Rule 9011, and served by means of a summons. That is a distinctive method of proceeding from that used to confirm a plan and provides notice with far greater force and clarity to creditors that the debtor is seeking to discharge their debt.

The Ninth's Circuit's analysis, though, which countenances debtors' actions that flout those provisions of the Bankruptcy Code and the Rules, creates a chaotic process in Chapter 13 that lays traps for the unwary, requires prudent parties to incur unneces-

sary costs, and burdens courts with the need to review plans multiple times. This process – often referred to as "discharge by declaration" or "discharge by ambush" – is antithetical to a debtor's obligation to deal equitably with its creditors when it seeks the enormous equitable benefit of a discharge.

Similarly, to the extent that the Amici states appear as secured creditors, they are also concerned with attempts by debtors to use Chapter 13 plans to invalidate security interests, even though Bankruptcy Rule 7001(2) provides that actions to "determine the extent, priority, and validity" of liens must also be brought by adversary proceedings. The Ninth Circuit's analysis would equally allow such plans to trump the provisions of the Code and the Rules. The Amici states have an interest in this case to ensure that their liens – for taxes, for costs of environmental cleanups, and for a myriad of other purposes – are not lost when debtors ignore the rules.

Under the decision here, creditors must *assume* debtors will include unlawful provisions in their plan and fail to provide legally-required notice thereof, so that they must devote their efforts to ferreting out those provisions and forcing debtors to rewrite their plans. At best, the decision places substantial unnecessary costs and burdens on *all* parties in the case as well as the courts. At worst, those who do not anticipate the debtor's violations will lose rights Congress intended them to retain. Moreover, since the costs of administering the student loan system are not personally apportioned but, rather, are imposed equally

on all student debtors,[1] those added costs will be spread onto borrowers who do play by the rules. The costs for protecting other debts and secured interests from frivolous plan provisions will similarly fall squarely on taxpayers of the Amici states.

Those costs will be increased even further by virtue of the Ninth Circuit's final ruling in the case – namely, that bankruptcy courts may not act *sua sponte* to bar confirmation of abusive plans and to police the actions of debtors and their counsel. The outbreak of "discharge by ambush" cases a decade ago was contained not only by the heightened diligence of creditors, but also by stern warnings by bankruptcy courts that inclusion of such provisions was improper and sanctionable. The Ninth Circuit's holdings, though, if left standing, will engender a new explosion of these cases, recreating the burden, costs, and uncertainty that occurred before. That is particularly true in light of the broad venue provisions of the Code which allow debtors to obtain favorable rulings merely by changing their residence. In an era of unprecedented budget shortfalls, the Amici states are deeply concerned that they not be forced to shoulder unnecessary costs to protect themselves from debtors who refuse to abide by the Code and Bankruptcy Rules.

STATEMENT OF CASE

In 1988-89, Mr. Espinosa obtained various gov-

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[1] *See Black v. Educational Credit Mgmt. Corp.*, 459 F.3d 796, 800-01 (7th Cir. 2006) (upholding imposition of collection costs as uniform percentage of debt owed).

ernment guaranteed student loans. In 1992, he filed a Chapter 13 case that listed his student loans as his only debts, proposed to pay only the principal, and stated any unpaid amounts (i.e., the prepetition and postpetition interest) would be discharged. He did not file an adversary proceeding to seek discharge of his debts, and his plan did not assert that payment of the interest would be an "undue hardship." Instead of serving an officer, managing or general agent, or other agent authorized to receive service of process with a summons and complaint as required by Bankruptcy Rule 7004(a) and (b)(3), Mr. Espinosa mailed a copy of his plan to a post office box used to receive payments on his loans.

The lender filed a proof of claim that was not objected to. It was later notified that the plan amount differed from its claim. It did not object to payment of that different amount. The standard discharge order was entered in 1997, providing that any debt for a student loan was excepted from discharge. In 2000, the Education Department began collection efforts and caused his income tax refunds to be intercepted. Three years later, in 2003, Espinosa filed a motion alleging that those actions violated the discharge injunction. The lender recalled the loans from the Education Department and moved, under Fed. R. Civ. P. 60(b)(4), for relief from the confirmation order. The bankruptcy court ruled for Espinosa, but the district court reversed, holding that the confirmation order was void for lack of due process. On further appeal, the Ninth Circuit remanded to the bankruptcy court to indicate if its original discharge order (which contradicted the plan terms) had been a clerical error,

and, upon being informed that the order *was* in error, the Ninth Circuit reversed the District Court and, entered the order at issue here. *In re Espinosa*, 553 F.3d 1193 (9th Cir. 2008)

ARGUMENT

The Ninth Circuit's analysis reduces to a few propositions. First, despite Bankruptcy Rule 7001(6), which requires an adversary proceeding and a showing of undue hardship to discharge a student loan debt, a debtor's plan may provide that the debt will be discharged and no such proof will be required. Second, despite the requirement in Bankruptcy Rule 7004 that an adversary proceeding must be brought by means of a complaint and summons served upon specified parties at a specified address, the debtor may mail a copy of the plan to a different address and without naming those specific parties. Third, the creditor has no right to assume that legal requirements for notice will be complied with so as to limit its involvement in the case in accordance with those requirements. And fourth, violation of the Rules has no relevance to the question of whether due process has been accorded to litigants such that *Mullane* has been satisfied. Instead, the Ninth Circuit assumes that *Mullane* prescribes some generic degree of notice that is adequate, even if that form of notice *violates* a rule or statute. Thus, under its view, if that general level of notice is provided, it is irrelevant that the creditor would have expected something better and could have been misled by its absence.

That analysis, the Amici states submit, violates the basic holding of *Mullane* that due process must be

decided after an analysis of *all of the circumstances.* Those circumstances surely include the fact that creditors have been told what notice they are to receive and are entitled to rely thereon. That fact is true in any civil proceeding; it is critical in the unique scenario posed by bankruptcy proceedings.

I. Bankruptcy's unique nature demands a consistent application of the rules.

Bankruptcy is quantitatively – and, in turn, qualitatively – different from any other form of litigation in federal court. Bankruptcy filings are far greater than all other federal cases combined – and the ratio has increased dramatically during the twenty years since Mr. Espinosa received his loans. In 1988, when he took out the loans, there were 549,612 nonbusiness bankruptcies. By 1992, when he filed his petition, that number had soared to 900,874, and by 1997, when he received a discharge, the number had grown by another 50 percent to 1,350,118. From 1998 to 2004, the number varied between a low of 1,217,972 in 2000 and a high of 1,625,208 in 2003.[2] After Congress amended the Code in April 2005, 620,000 petitions were filed in October 2005 alone to avoid the effective date of the new act, resulting in an

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[2] All filing rates taken from charts maintained by American Bankruptcy Institute: http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=56822. All websites cited herein were viewed on April 7, 2009.

annual total or more than 2 million cases.[3] After dropping dramatically the following year (to just under 600,000 cases), the numbers have grown each succeeding year – to more than 800,000 in 2007, over 1 million in 2008, and a projected total of perhaps as many as 1.4 to 1.6 million in 2009.[4]

By contrast, in 1992, there were 66,875 federal criminal and 229,850 federal civil cases for a total of 296,725 filings,[5] less than a third of the 900,000 plus bankruptcy filings. By 1997, other federal filings had risen only to 322,390, compared to 1.35 million bankruptcy filings – a 4.1 to 1 ratio. Those other filings varied little in succeeding years, averaging about 340,000 cases a year from 2004 to 2008. Even with an initial slowing after the 2005 amendments, bankruptcy cases during that period averaged about 1.2 million or about three and half times the rest of federal cases. As filings soar again this year, the ratio should move back above the 4 to 1 mark. Chapter 13

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[3] *See* http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=42631.

[4] *See* Appendix 1 for 2006-08 statistics. See http://www.creditslips.org/creditslips/2009/04/my-entry.html#more for predictions by Professor Robert Lawless for 2009 filings.

[5] *See* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs92.pdf p. 12 (criminal filings) and http://www.lectlaw.com/files/jud09.htm (civil filings). (Criminal statistics are for calendar year 1992; the civil statistics are for FY 93, beginning October 1992).

cases typically have comprised about 30 percent of all consumer cases.[6] Thus, except for the exceptional year of 2006, Chapter 13 cases alone have equaled (or substantially exceeded) the total of the rest of the federal civil system during this entire period.

The reality is that bankruptcy, at least on the consumer debtor side, is a high volume, highly standardized practice that uses software packages, form pleadings, standard plans, "no look" fee approvals, and the like to handle the wholesale business of processing hundreds of thousands of petitions each year. In that regard, while the federal courts obviously handle many complex, multi-party cases, most civil litigation still involves only two-party disputes raising a finite number of related issues. Bankruptcy cases, by contrast, inevitably involve unrelated claims by many different parties against the debtor. The debtor (or trustee), in turn, must analyze a wide variety of state law and Code-created claims against creditors and third parties, contest liens of those parties, and defend challenges to the claimed exemptions. Further, in filings under Chapters 11, 12, and 13, debtors have broad leeway to propose plan terms and creditors may vote on and/or object to those proposed plans. And, finally, the debtor and his creditors may litigate his right to a general discharge, or whether specific debts may be discharged. That multitude of proceedings, moreover, takes place on a highly compressed

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[6] *See* http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm.

schedule compared to normal federal litigation.[7]

This cacophony of actions could result in chaos in the absence of the carefully-orchestrated provisions of the Code and the Rules which set procedural mechanisms for different types of actions, with specific notice, timing, and objection provisions for each. Those clearly spelled out rules give all parties the information they need to navigate the complex waters of bankruptcy litigation without running aground. If those provisions can be ignored, however, creditors will be left unsure as to what they must do to retain their rights and be forced to incur added costs to litigate issues the Code and Rules have already settled.

Creditors, though, should have a right to receive the notice due to them under the Rules and to gauge their actions accordingly. That truism undoubtedly applies even when a defendant is involved in only one case with a single other party, but the need for rules to be followed increases geometrically where a single defendant, such as the student loan creditors – or a tax authority of the Amici states – may be faced with literally thousands or tens of thousands of cases in a

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[7] Plans must be filed no later than 15 days after the petition date. Bankruptcy Rule 3015(a). The confirmation hearing currently must be at least 20 days after the Section 341 meeting of creditors, which in turn, under Bankruptcy Rule 2003(a) is to be held between 20 and 50 days after the case is filed. Section 1324(b). Thus, if the plan is filed on the 15th day, the plan confirmation hearing could be as early as the 40th day of the case. Before 2005, there was no minimum period set between the petition date and the confirmation hearing.

single year.[8] To cope with those filings in an economically realistic fashion, creditors must set up automated systems to handle their cases, delegate much of the work to paralegals, and train secretarial staff as to which matters must be brought to counsel's attention and which do not require further action. In making those case-handling judgments, creditors have a right to gauge their actions in accordance with the clear terms of the Code and the Rules.

That is particularly true when a third salient reality of Chapter 13 cases is considered, namely, the fact that, despite the array of potential litigation relative to any given filing, these are usually low-dollar cases. In FY 2007, for instance, the payments made through Chapter 13 cases totaled some $2.8 billion for secured claims, $390 million for debtors' counsel, $300 million for priority debt, and $257 million for the trustees, for a total of about $3.75 billion - leaving only $1.35 billion for all unsecured creditors.[9] Divided by the

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[8] As noted by the defendant, the federal student loan programs service more than $500 billion of loans. The defendant here received notice of 24,411 bankruptcies in 2008 alone. U.S. DEPT. OF EDUC., FINANCIAL AND PERFORMANCE QUARTERLY UPDATE, Issue 2008-2, at 7 (Sept. 30, 2008).

[9] *See* http://www.usdoj.gov/ust/eo/private_trustee/library/chapter13/docs/ch13ar07-AARpt.xls; FY-2007 Chapter 13 Trustee Audited Annual Reports. The total was even less before the 2005 amendments – *see* Prof. Scott F. Norberg, *Chapter 13 Project: Little Paid to Unsecureds*, 26 Amer. Bank. Inst. J. 1 (March 2007) (less than 20% of receipts went to

roughly 300,000 Chapter 13 cases filed in 2007, that resulted in an average payout to unsecured creditors of little more than $4,500 per case. When potential recoveries are so small, unsecured creditors like the student lenders here must judge carefully how much to spend on reviewing and litigating plan terms, knowing that their real hope of payment comes from collecting nondischargeable debts after the plan is finished and competing obligations are discharged.

Finally, it is important to consider how Chapter 13 plans will be structured if a debtor knows that it must comply with the law. The Chapter 13 discharge in Section 1328 excepts certain debts (including student loans) from discharge. Further, it is well settled that interest accruing on non-dischargeable debts (such as was the case here) is also excepted from the discharge. *Bruning v. United States*, 376 U.S. 358, 360 (1964); *In re Foster*, 319 F.3d 495, 497-98 (9th Cir. 2003). If a debtor knows it cannot discharge such debts through plan provisions, it not only has no incentive to discriminate against those debts, it has a positive incentive to give them *preferential* treatment. Courts differ on whether such treatment is allowed; the point is simply that, if the debtor knows he can discharge the debt only by filing an adversary complaint, he has every reason to pay as much as possible on such debts under its plan, since each dollar not paid on a nondischargeable debt is a one that he must pay later. Accordingly, a creditor that does not want to waste money in Chapter 13 cases or run up costs

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unsecured creditors).

for those who *are* paying their debts, can rely on those built-in incentives to ensure that it will receive as much under the plan as it is legally entitled to. It can, then, direct its limited resources to higher-priority issues, such as defending actual undue hardship adversary actions.

On the other hand, if debtors are free to ignore both the substantive and procedural requirements of the Code and the Rules, then they have every reason to underpay disfavored creditors or seek to discharge debts improperly through plan provisions. Thus, until creditors are alerted by decisions such as the one below, debtors can obtain substantial and unwarranted benefits from those who make the mistake of relying on the rule they have read. And, while creditors with many cases presumably will learn to adapt to a new regimen based on this altered version of the Rules (*albeit* at substantial, unnecessary cost and burden to all parties), occasional creditors may not learn until too late that they were foolish to have assumed that the Rules applied to debtors too. That is not a state of affairs that this Court should tolerate; the Amici states urge the Court to take certiorari on this case in order to reverse the decision below.

II. The decision below conflicts with holdings of this Court and other circuits.

In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 449-452 (2004), this Court described the student loan discharge provisions, noting that Section 523(a)(8) is "self-executing;" that the debtor must "affirmatively secure[] a hardship determination" to discharge a student loan debt; that creditors are given

"greater procedural protection" before such debts can be discharged even though creditors are not generally entitled to personal service prior to the entry of the discharge; and that an adversary proceeding must be filed to discharge the debt. This Court did, to be sure, state that "*absent Rule 7001(6)*, a debtor could proceed by motion, . . . which would raise no constitutional concern," 541 U.S. at 453 (emphasis added), but that does not mean, as the Ninth Circuit stated that it would be "wrong and dangerous" to allow Congress to define what is required for due process if it chooses to do so. *Espinosa*, 553 F.3d at 1204. The reality is that Rule 7001(6) *does* exist and it *does* impose positive obligations on a debtor – obligations that cannot be disregarded in evaluating the rights of the creditor. The suggestion that *Hood* allows courts to disregard the effect of Rule 7001(6) was rightfully rejected out of hand by *In re Hanson*, 397 F.3d 482, 487 (7th Cir. 2005). Correcting the Ninth Circuit's misreading of *Hood* is itself sufficient reason to grant certiorari.

Even absent the conflict with *Hood*, the Ninth Circuit's ruling puts it squarely in conflict with five other Circuits, as well as this Court's holding in *Mullane*. The Ninth Circuit openly conceded that it had placed itself on the opposite side of all of its sister circuits, as well as the District Court in this case, and the Ninth Circuit Bankruptcy Appellate Panel in *In re Repp*, 307 B.R. 144 (9th Cir. BAP 2004), *reversed by Espinosa*, 553 F.3d at 1204, n. 6. Its decision to give debtors who live in – or move to[10] – the largest

[10] Under the venue provisions of 28 U.S.C. § 1408, a

circuit in the country a preferable position vis-à-vis discharging their student loans compared to those in those other circuits, creates the sort of split that calls for resolution by this Court.

The cases in the other circuits involved the same fact pattern as here – a Chapter 13 debtor who used plan language to discharge a debt, ignoring the Rule stating that he must bring an adversary action to determine undue hardship. In each case, the creditor did not object to the plan or appeal from confirmation, but sought to collect the debt after the plan ended and was met by the contention that the confirmed plan was *res judicata* of the issue. In each case, the Circuit Court held, contrary to the Ninth Circuit's ruling here, the orders were void due to the debtor's violation of due process. Indeed, although the Tenth Circuit had initially relied on *res judicata* principles to uphold "discharge by declaration" in *Andersen v. UNIPAC-NEBHELP* (*In re Anderson*), 179 F.3d 1253 (10th Cir. 1999), it eventually overruled *Andersen* in its *en banc* decision in *Educ. Credit. Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (2007), when it considered the due process issues the Ninth Circuit rejected in this case.

Further, the same issue has also arisen with respect to whether liens can be invalidated through plan provisions, rather than adversary proceedings as required by Bankruptcy Rule 7001(2). *See In re Man-*

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case may be brought wherever a debtor is currently domiciled, regardless of where the debt was incurred or the lender located.

saray-Ruffin, 530 F.3d 230, 35-36 (3rd Cir. 2008); *In re Bateman*, 331 F.3d 821, 830-833 (11th Cir. 2003); *Cen-Pen Corp. v. Hanson*, 58 F.3d 89 (4th Cir. 1995), all holding that liens cannot be invalidated through plan provisions. Indeed, *see In re Brawders*, 503 F.3d 856, 859-870 (9th Cir. 2007) (affirming decision by Bankruptcy Appellate Panel) and *In re Enewally*, 368 F.3d 165, 1173 (9th Cir. 2004), both of which appear to endorse the same concept. Thus, the Ninth Circuit is in conflict with itself on these issues, and its student loan analysis sets up conflicts with this line of decisions as well.

In short, the Ninth Circuit has created uncertainty where the Bankruptcy Rules prescribe a bright-line requirement, leaving parties to grapple with an amorphous balancing process despite the fact that Congress has prescribed the proper process with complete clarity. Under the Rules, the result is simple – either a summons and complaint are properly served on a proper party, or they are not. But under the Ninth Circuit's approach, courts must decide whether some other, lesser form of notice is adequate under the circumstances of each particular case. Indeed, if its approach is correct, why would it not equally allow parties to disregard the provisions of Fed. R. Civ. Proc. 4 when they commence an ordinary civil action? If one can ignore the duty to serve a complaint and summons yet still bind a party to a default judgment in bankruptcy by mailing some document to the other party, why should that same result not obtain in other litigation? The suggestion would be absurd outside of bankruptcy; it is no less so in bankruptcy.

If anything, it is more necessary in light of the complex, multi-faceted bankruptcy process. The Ninth Circuit's opinion imposes added costs and burdens with no countervailing benefits. Indeed, by gratuitously reviving an abuse that was largely eliminated through the vigilance of creditors and courts, the Ninth Circuit has made handling of bankruptcy matters more difficult than necessary. Those difficulties will increase in light of the new discharge exceptions in Chapter 13 discharge, giving debtors greater incentives to evade the Rules. It is critical that certiorari is granted here so that the Court may bring the law in the Ninth Circuit back into conformity with that of the other Circuit Courts and restore the constitutionally mandated "uniform" law of bankruptcy. U.S. Const. art. I, § 8, cl. 4.

III. The Ninth Circuit erred in its ruling on the merits.

It is also important for this Court to grant certiorari because of the Ninth Circuit's plain error in its rulings on the merits. The discussion below merely touches on the problems with the Ninth Circuit's ruling that must be corrected. Specifically, the decision below erred in not finding that the confirmation order was void for lack of due process in two separate, but related aspects. The Ninth Circuit's rejection of these arguments further illustrates the split among the Circuit Courts on these issues.

A. Where the Bankruptcy Code and Rules prescribe the procedure for discharge of a student loan, the bankruptcy court cannot approve a plan that ignores the procedure.

The Bankruptcy Rules state that an adversary proceeding is the exclusive procedure for determining the dischargeability of a debt in bankruptcy court. Bankruptcy Rule 7001(6). *Hood*, 541 U.S. at 449-452. Under Section 1322(b)(11), a Chapter 13 plan may contain any provision "not inconsistent with this title." Similarly, Section 1325(a)(1) provides that the court "shall confirm a plan if – (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title; . . . [and] (3) the plan has been proposed in good faith and not by any means forbidden by law." Thus, Congress has thrice stated that plans must only contain lawful provisions and that courts may only confirm lawful plans.

Based on those provisions, and as set out in more detail in Petitioner's brief, other Circuits have held that the Bankruptcy Court lacks the authority to grant a discharge of student loan debt through the plan process. *See Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 154-55, 156, n.2 (2nd Cir. 2005) (using plan process makes discharge provision "void *ab initio*"); *Banks v. Sallie Mae Servicing Corp.*, 299 F.3d 296, 300 (4th Cir. 2002). Section 1325 does not issue mere hortatory admonishments to the debtor; rather, it imposes *requirements* the plan must satisfy to be confirmed. *Mersmann*, 505 F.3d at 1048, 1049 ("§ 1325(a)(1) . . . permits the confirmation of a plan

only if it is consistent with the rest of the Code;" "bankruptcy court lacks authority to confirm" plan that does not use adversary proceeding); *Hanson*, 397 F.3d at 487 ("Failure to comply with the Code has been said to render the plan and any confirming order 'nugatory.'"). *See also Shaw v. Aurgroup Financial Credit Union*, 552 F.3d 447, 455-58 (6th Cir. 2009); *In re Jones*, 530 F.3d 1284, 1289-90 (10th Cir. 2008), both holding requirements of Section 1325(a) are mandatory. Even if this position is in dispute, that simply creates further conflicts that this Court should resolve. That is particularly true where the Ninth Circuit ended its discussion with the conclusion that bankruptcy courts not only could confirm plans that violated the Code – but they were *barred* from refusing to do so. *Espinosa*, 533 F.3d at 1205 (reversing prior decisions denying confirmation of such plans). Such a clear conflict cries out to be resolved by this Court.

B. Where the Bankruptcy Code or Rules prescribe a particular form of notice, denial of that notice violates due process.

An adversary proceeding is commenced by filing a complaint that must, under Bankruptcy Rule 7008 show "that the [debtor] is entitled to relief" and the specific relief sought. Thus, unlike a debtor's bare demand in a plan for a discharge, a complaint must show the alleged hardship, name the lender, set out the desired relief, and be served by summons on a high-level official or person designated to receive service. Those measures bring home to the creditor in a clear and direct fashion that its *specific* interests are

being challenged and that it must look to those interests or suffer a default. By comparison, the debtor need not even serve a full Chapter 13 plan on creditors, only a summary thereof. Bankruptcy Rule 3015(d). Indeed, Section 521(e)(3) now states that a plan is provided to a creditor *only* if it requests the plan and pays for the copy it receives.

In short, the notice requirements for an adversary proceeding are far more exacting than the notice required for confirmation of a Chapter 13 plan. Nevertheless, because USA Funds received some "notice" that a plan was filed, and could have inquired into the effect of the proposed plan on its claim, the Ninth Circuit held that it had received all the notice that it was due on the discharge issue. That conclusion is incorrect both practically and legally. As a practical matter, large creditors, like USA Funds, receive "tidal waves of mail. . . . The quantity 'of notice' that is issued by the bankruptcy system is so overwhelming that it is necessary to have clear rules in order for creditors to know what notices to notice as opposed to the notices that are deafening legal background noise. The Code and the Rules set forth those clear standards and it is up to the courts to ensure that the lines are not blurred." *In re Ruehle*, 412 F.3d 679, 682-83 (6th Cir. 2004).

As a legal matter, this Court has stated that due process requires "notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)

(emphasis added). The other Circuits have concluded that, at a minimum, that means that parties must receive the notice they have been promised. *See, e.g., Banks*, 299 F.3d at 303 ("due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect"); *Ruehle*, 412 F.3d at 684-85 (parties are "entitled to the prescribed level of notice for the process to be due"); *Mersmann*, 503 F.3d at 1049 ("creditor has a right to assume that he will receive all of the notices *required by statute* before his claim is forever barred.").

That principle was stated by this Court in *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953) where it considered whether a party could be bound by a confirmation order where it knew of the case but had not been mailed notice of the hearing on the plan as required under the statute and the rules. This Court rejected the argument that knowledge of the case would put a party on inquiry notice so that it would be obligated to take steps to learn of the hearing, stating that "even creditors who have knowledge of a reorganization have a right to assume that the *statutory* 'reasonable notice' will be given them before their claims are forever barred." (Emphasis added). Courts continue to apply that rule in Chapter 11 cases, even where they also find that the different circumstances in Chapter 7 and 13 cases *can* bind parties to mere inquiry notice. *See In re Metzger*, 346 B.R. 806, 817-19 (Bankr. N.D. Cal. 2006), explaining the differences and noting the effect of varying statutory provisions in the different chapters. Thus, it is clear that there is no one single size

notice that satisfies all constitutional duties.

The same is true here – the creditors have been told that they will receive a particular form of "reasonable notice," but the debtor provided a different, lesser form of notice that it argues was "good enough." The Ninth Circuit decided that, because the alternative service might have been adequate, in the absence of any specified provisions in the statute or Rule, that it was immaterial that it was not the service that was *required*. That conclusion, though, ignores the critical distinction between being given *no* information and being given *misleading* information. If nothing had been said about how undue hardship would be decided, the creditor would have no alternative but to examine each paper it received with care to determine if a discharge action was lurking within. But, where a specific form of notice is specified, creditors have a right to rely thereon and limit their monitoring efforts accordingly.

Put another way, if the Rules had said, "no action can be taken to affect the discharge of any debt unless the notice is sent in a blue envelope," a creditor could not be faulted for not reviewing documents sent in white envelopes to determine if attempts were being made to affect their debts. The result is no different here – the creditor is told explicitly what to expect, but the debtor used a different mode entirely. The Ninth Circuit held that the lender was sophisticated and it was "highly unlikely" that it was misled by "customary bankruptcy procedure," *Espinosa*, 553 F.3d at 1205 – a statement true only if is "customary" for debtors to ignore the Code and the Rules.

The Ninth Circuit's basic error is its failure to apply *Mullane*'s requirement that due process requires consideration of *all the circumstances*. In *Mullane*, a trustee sought to settle its accounts where thousands of parties were involved and it could not ascertain names and addresses for many of them. The trustee relied on state law that *allowed* publication notice for all parties, but this Court held that such notice could be used only for unknown creditors. Known creditors were entitled to actual service even where there was no reason to believe the trustee had done anything wrong or that any party would sue. Moreover, this was the only action involving the beneficiaries, not one of thousands to which they must respond. Nevertheless, this Court made clear that due process was not a mere gesture, but must be calculated by what a person would do who truly wanted to communicate to another.

Here, by contrast, the debtor is *violating* the Rules, the plan takes away the creditor's rights, the debtor typically has a manageable number of creditors to notify and knows their contact information, while the creditor is dealing with a huge case load that must be carefully managed. Under those circumstances, the debtor knows that creditors will justifiably rely on the Rules to determine the efforts they must make. Allowing debtors to exploit that reliance does not satisfy *Mullane*; it is the antithesis of *Mullane*. Nor can it simply be assumed, as the Ninth Circuit held, that creditors actually *agree* that their claims should be discharged so that it would be *improper* for bankruptcy courts to challenge such provisions *sua sponte*, despite their broad policing powers

under Section 105(a). By doing so, the Ninth Circuit has reinvigorated the concept of discharge by ambush, while removing a powerful tool to alleviate the problem. Under all of these circumstances, this is plainly a decision that demands reversal.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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MARY H. WILLIAMS
Deputy Attorney General
JEROME LIDZ
Solicitor General
CAROLYN G. WADE
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Counsel for Amicus Curiae
State of Oregon

April 13, 2009

APPENDIX A

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Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

No. 08-1134

In The

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 10, 2009
Certiorari Granted June 15, 2009

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RELEVANT DOCKET ENTRIES

BANKUPTCY COURT

Date Filed	#	Docket Text
12/07/1992	1	Voluntary petition under chapter 13 [Entered: 12/08/92], [SFB] ALL Schedules and Statement of Affairs Filed, [SFB]
12/7/1992	3	Chapter 13 Plan, [SFB]
4/15/1993	12	CONFIRMATION HEARING; TRUSTEE RECOMMENDS: Plan will be confirmed subject to stip and order w/dtr/trustee Trus has received the S/O alrdy. [JG], [KAG]
5/06/1993	14	ORDER Confirming Plan Re: Item #3, [KAG]
6/10/1993	15	Trustee's notice to creditor advising how claim will be treated, giving 30 days to object #1 [United Student Aid Funds], [KAG]
5/30/1997	20	DISCHARGE OF DEBTOR, [JRR]
6/23/2003	26	Motion to Reinstate Case, Motion to Reopen Case by the Debtor in Order to Seek Relief Pursuant to 11 U.S.C. Section 524(a)(2) (No Fee Due) filed by JAMES L. ROBINSON, JR of ROBINSON & RYLANDER PC on behalf of FRANCISCO J. ESPINOSA. (Rogney, Jill) Modified by J. Rogney on 10/14/02003 (Rogney, Jill).
6/25/2003	27	Order Reopening Case signed on 6/25/2003 (related document(s) 26). (Rogney, Jill)
8/12/2004	37	Memorandum Decision signed on 8/12/2004 (related document(s) 29). (Gaare, Kathy)
8/12/2004	38	Order signed on 8/12/2004 (related document(s) 29). (Gaare, Kathy)
8/18/2004	39	Notice of Appeal (255.00 fee) filed by MADELEINE C. WANSLEE of GUST ROSENFELD, P.L.C. on

		behalf of UNITED STUDENT AID FUNDS, INC. (related document(s) 38). District Court CV-04-447-TUC-RCC (WANSLEE, MADELEINE) Modified on 3/1/2006 (Granillo, Bev)
7/25/2008	54	Motion to Approve *Motion to Correct Clerical Mistake in Order of Discharge* filed by MICHAEL J. MEEHAN of Munger Chadwick on behalf of FRANCISCO J. ESPINOSA. (MEEHAN, MICHAEL)
8/20/2008	62	ORDER Granting Motion to Approve (Related Doc # 54) signed on 8/20/2008). (Mattingly, Teresa)

RELEVANT DOCKET ENTRIES

DISTRICT COURT

Date Filed	#	Docket Text
7/20/2006	11	ORDER; It is hereby ordered that the ruling of the Bankruptcy Court is REVERSED, and the case is REMANDED for further proceedings. Signed by Judge Raner C. Collins on 07/18/06. (LMF)
7/28/2006	12	NOTICE OF APPEAL to 9th Circuit, by Francisco J. Espinosa. Filing fee $455. (Rylander, Daniel)

RELEVANT DOCKET ENTRIES

COURT OF APPEALS

Date Filed	#	Docket Text
6/24/2008	32	Filed per curiam opinion (ALEX KOZINSKI, A. WALLACE TASHIMA and N. RANDY SMITH) The parties shall notify us within 5 days of the entry of the bankruptcy court's order, and we shall determine at that time whether the case requires further briefing or can be resubmitted on the existing briefs and arguments. SUBMISSION VACATED; REMANDED FOR A LIMITED PURPOSE. (PH)
10/02/2008	36	FILED OPINION (ALEX KOZINSKI, A. WALLACE TASHIMA and N. RANDY SMITH) REVERSED AND REMANDED. FILED AND ENTERED JUDGMENT. (PH)
12/10/2008	46	Filed order and amended opinion (ALEX KOZINSKI, A. WALLACE TASHIMA and N. RANDY SMITH). The opinion filed October 2, 2008 is amended as follows: (See order for full text). The petition for rehearing en banc is denied. See Fed R. App. P. 35. No further petitions may be filed and all pending motions are denied. (RP)

92-3819 TUC LO

UNITED STATES BANKRUPTCY COURT ARIZONA DISTRICT OF ARIZONA	VOLUNTARY PETITION

IN RE *ESPINOSA, FRANCISCO J.*	NAME OF JOINT DEBTOR
ALL OTHER NAMES used by the debtor in the last 6 years *NONE*	ALL OTHER NAMES used by the joint debtor in the last 6 years
SOC. SEC.#/TAX I.D.# *349-68-6653*	SOC. SEC.#/TAX I.D.#
STREET ADDRESS OF DEBTOR *5100 N LA CANADA #57* *TUCSON AZ 85704* COUNTY OF RESIDENCE OR BUSINESS *PIMA*	STREET ADDRESS OF JOINT DEBTOR COUNTY OF RESIDENCE OR BUSINESS
MAILING ADDRESS OF DEBTOR *SAME*	MAILING ADDRESS OF JOINT DEBTOR
BUSINESS DEBTOR'S PRINCIPAL ASSET LOCATION *NOT APPLICABLE*	VENUE [X] *Debtor's domicile, residence, or business assets were in this District for the 180 days preceding this petition.*

INFORMATION REGARDING DEBTOR

DEBTOR TYPE: [X] *Individual* DEBT NATURE: [X] *Non-Business/Consumer*	CHAPTER/SECTION: [X] *Chapter 13* FILING FEE: [X] *attached*
	NAME AND ADDRESS OF LAW FIRM OR ATTORNEY *JAMES L. ROBINSON, JR.* *AZ. BAR #3184, PIMA BAR #48612* *4320 N. CAMPBELL AVE., STE. 238* *TUCSON, ARIZONA 85718* Telephone No. *(602) 299-4922*
	ATTORNEY(S) REPRESENTING DEBTOR *JAMES L. ROBINSON, JR.*
	[ ] *Debtor not represented by an attorney.*

STATISTICAL ADMINISTRATIVE INFORMATION (28 U.S.C. 604)

[X] *Funds will not be available for unsecured creditors*

ESTIMATED NO. OF CREDITORS:	[X]	*1-15*
ESTIMATED ASSETS (thousands):	[X]	*Under 50*
ESTIMATED LIABILITIES (thousands):	[X]	*Under 50*
ESTIMATED NO. OF EMPLOYEES:	[X]	*Not Applicable*
ESTIMATED EQUITY SECURITY HOLDERS:	[X]	*Not Applicable*

THIS SPACE FOR COURT USE ONLY

FILED
DEC 7 1 47 PM '92
KEVIN E. O'BRIEN
CLERK
U.S. BANKRUPTCY COURT
DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT
FOR THE ARIZONA DISTRICT OF ARIZONA

In re *FRANCISCO J. ESPINOSA* Case No.
Chapter *13*
Debtor

Attorney for Debtor: JAMES L. ROBINSON, JR.

STATEMENT Pursuant to Rule 2016(b)

The undersigned, pursuant to Rule 2016(b), Rules of Bankruptcy Procedure, states that:

1. The compensation paid or promised by the Debtor(s), to the undersigned, is as follows:

For legal services rendered, Debtor(s) agrees to pay	$ 2,000.00
Prior to the filing of this Statement, Debtor(s) has paid	500.00
Balance Due	1,500.00

2. The Filing Fee *has been paid*.

3. The Services rendered or to be rendered include the following:

   (a) Analysis of the financial situation, and rendering advice and assistance to the client in determining whether to file a petition under Title 11, U. S. C.
   (b) Preparation and filing of the petition, schedules, statement of affairs and other documents required by the court.
   (c) Representation of the client at the first meeting of creditors.

4. The source of payments made by the debtor(s) to the undersigned was from earnings, wages and compensation for services performed, and none other.

5. The source of payments to be made by the debtor(s) to the undersigned for the unpaid balance remaining, if any, will be from earnings, wages and compensation for services performed, and none other.

6. The undersigned has received no transfer, assignment or pledge of property from the debtor(s) except the following for the value stated: None.

7. The undersigned has not shared or agreed to share with any other entity, other than with members of the undersigned's law firm, any compensation paid or to be paid except as follows: None.

Dated: *December 4, 1992*

Respectfully submitted,

Attorney for Petitioner: *JAMES L. ROBINSON, JR.*
AZ BAR # 004384, DMA BAR # 48612
6320 N. CAMPBELL AVE. STE. 238
TUCSON, ARIZONA 85718

UNITED STATES BANKRUPTCY COURT
FOR THE ARIZONA DISTRICT OF ARIZONA

In re *FRANCISCO J. ESPINOSA* Case No.
Chapter *13*
Debtor

Attorney for Debtor: JAMES L. ROBINSON, JR.

SUMMARY OF SCHEDULES

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	AMOUNTS SCHEDULED ASSETS	LIABILITIES	OTHER
A - Real Property	Yes	1	$ 0.00		
B - Personal Property	Yes	3	$ 2,415.00		
C - Property Claimed As Exempt	Yes	2			
D - Creditor Holding Secured Claims	Yes	1		$ 0.00	
E - Creditors Holding Unsecured Priority Claims	Yes	2		$ 13,250.00	
F - Creditors Holding Unsecured Nonpriority Claims	Yes	1		$ 0.00	
G - Executory Contracts and Unexpired Leases	Yes	1			
H - Codebtors	Yes	1			
I - Current Income of Individual Debtor(s)	Yes	1			$ 1,397.50
J - Current Expenditures of Individual Debtor(s)	Yes	1			$ 1,125.00

Total Number of sheets in ALL Schedules > 14

Total Assets > $ 2,415.00

Total Liabilities > $ 13,250.00

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of 15 sheets, and that they are true and correct to the best of my knowledge, information, and belief.

Date *December 4, 1992* Signature *Francisco J Espinosa*
FRANCISCO J. ESPINOSA, Debtor

Penalty for making a false statement or concealing property. Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. SS 152 and 3571.

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE A - REAL PROPERTY

Description and Location of Property	Nature of Debtor's Interest in Property	H W J C	Market Value of Debtor's Interest	Amount of Secured Claim
NONE			Total $ 0.00	

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE B - PERSONAL PROPERTY

Description of Property	Location	H W J C	Market Value of Debtor's Interest Before Claim
1. Cash on hand. [x] NONE			
2. Checking, savings or other financial accounts, certificates of deposits or shares in banks, savings, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives. [x] NONE			
3. Security deposits with public utilities, telephone companies, landlords, and others.			
Deposit with Sun River Apts.			$ 100
4. Household goods and furnishings, including audio, video, and computer equipment.			
One Waterbed			$ 75
Bedding			$ 100
One alarm clock			$ 5
One stereo and one VCR			$ 220
Tools			$ 80
5. Books; pictures and other art objects; antiques; stamp, coin, record, tape, compact disc, and other collections or collectibles.			
Architectural Drafting Books			$ 10
Printed Board Design Book			$ 10
6. Wearing apparel.			
Men's clothing			$ 500
7. Furs and jewelry.			
One Seiko watch			$ 75
8. Firearms and sports, photographic, and other hobby equipment.			
One football			$ 20
One baseball glove and bat			$ 20

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

Description of Property	Location	H W J C	Market Value of Debtor's Interest Before Claim
9. Interests in insurance policies. [x] NONE			
10. Annuities. [x] NONE			
11. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. [x] NONE			
12. Stock and interests in incorporated and unincorporated businesses. *100 Shares of stock in America West Airlines - company is in bankruptcy.*			NONE
13. Interests in partnerships or joint ventures. [x] NONE			
14. Government and corporate bonds and other negotiable and non-negotiable instruments. [x] NONE			
15. Accounts receivable. [x] NONE			
16. Alimony, maintenance, support, and property settlements, to which the debtor is or may be entitled. [x] NONE			
17. Other liquidated debts owing debtor including tax refunds. [x] NONE			
18. Equitable and future interests, life estates, and rights of power exercisable for the benefit of the debtor other than those listed in Schedule of Real Property. [x] NONE			
19. Contingent and non-contingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust. [x] NONE			
20. Other contingent and unliquidated claims of every nature, including tax refunds, counter claims of the debtor, and the rights to setoff claims. [x] NONE			

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

Description of Property	Location	H W J C	Market Value of Debtor's Interest Before Claim
21. Patents, copyrights, and other intellectual property. [x] NONE			
22. Licenses, franchises, and other general intangibles. [x] NONE			
23. Automobiles, trucks, trailers, and other vehicles and accessories.			
1984 Ford T-Bird			$ 1,200
24. Boats, motors, and accessories. [x] NONE			
25. Aircraft and accessories. [x] NONE			
26. Office equipment, furnishings, and supplies. [x] NONE			
27. Machinery, fixtures, equipment, and supplies used in business. [x] NONE			
28. Inventory. [x] NONE			
29. Animals. [x] NONE			
30. Crops - growing or harvested. [x] NONE			
31. Farming equipment and implements. [x] NONE			
32. Farm supplies, chemicals, and feed. [x] NONE			
33. Other personal property of any kind not already listed. [x] NONE			
		Total	$ 2,415

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE C - PROPERTY CLAIMED EXEMPT

Debtor elects the exemptions to which debtor is entitled under:
[x] 11 USC 522(b)(2): Exemptions available under applicable nonbankruptcy federal laws, and state or local laws.

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Value of Property w/o Deducting Exemption
Security deposits with public utilities, landlords, etc.			
Deposit with Sun River Apts.	*Ariz. Rev. Stat. S33-1126*	$ 100	$ 100
Household goods and furnishings			
One Waterbed	*Ariz. Rev. Stat. S33-1123*	$ 75	$ 75
Bedding	*Ariz. Rev. Stat. S33-1123*	$ 100	$ 100
One alarm clock	*Ariz. Rev. Stat. S33-1123*	$ 5	$ 5
One stereo and one VCR	*Ariz. Rev. Stat. S33-1123*	$ 220	$ 220
Tools	*Ariz. Rev. Stat. S33-1123*	$ 80	$ 80
Books, pictures, art and collections			
Architectural Drafting Books	*Ariz. Rev. Stat. S33-1125*	$ 10	$ 10
Printed Board Design Book	*Ariz. Rev. Stat. S33-1125*	$ 10	$ 10
Wearing apparel			
Men's clothing	*Ariz. Rev. Stat. S33-1125*	$ 500	$ 500
Furs and jewelry			
One Seiko watch	*Ariz. Rev. Stat. S33-1125*	$ 75	$ 75
Firearms, and sports, photographic, and other hobby equipment			
One football	*Ariz. Rev. Stat. S33-1125*	$ 20	$ 20

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE C - PROPERTY CLAIMED EXEMPT
(Continuation Sheet)

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Value of Property w/o Deducting Exemption
One baseball glove and bat			$ 20
	Ariz. Rev. Stat. S33-1125	$ 20	
Automobiles, trucks, trailers, etc, and accessories			
1984 Ford T-Bird			$ 1,200
	Ariz. Rev. Stat. S33-1125	$ 1,200	

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

Creditor Name and Address	Date, Nature of Lien, Description & Value	Claim Amount	Unsecured Portion and Notes*

[X] Debtor has no creditors holding secured claims to report on this Schedule D.

No continuation sheets attached

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS
PRIORITY TYPE: Taxes and Certain Other debts Owed to Governmental Units

	Creditor Name and Address	Claim Date and Consideration	Claim Amount	Amount with Priority and Notes*
1.	Account No. 349-68-6653 UNITED STUDENT AID FUNDS # 1 P O BOX 6180 INDIANAPOLIS IN 46206-6180	1988 Student Loan	$ 2,625.00	$ 2,625.00
2.	Account No. 349-68-6653 UNITED STUDENT AID FUNDS # 2 P O BOX 6180 INDIANAPOLIS IN 46206-6180	1988 Student Loan	$ 2,625.00	$ 2,625.00
3.	Account No. 349-68-6653 UNITED STUDENT AID FUNDS # 3 P O BOX 6180 INDIANAPOLIS IN 46206-6180	1988 Student Loan	$ 4,000.00	$ 4,000.00
4.	Account No. 349-68-6653 UNITED STUDENT AID FUNDS # 4 P O BOX 6180 INDIANAPOLIS IN 46206-6180	1988 Student Loan	$ 4,000.00	$ 4,000.00

Continuation sheet no. 1 of 1 Subtotal: $ 13,250.00

In re: *FRANCISCO I. ESPINOSA* _____/ Debtor Case No.

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

[ ] Debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY

[ ] Extensions of credit in an involuntary case
Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. S507(a)(2).

[ ] Wages, salaries, and commissions
Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees, up to a maximum of $2000 per employee, earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. S507(a)(3).

[ ] Contributions to employee benefit plans
Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. S507(a)(4).

[ ] Certain farmers and fishermen
Claims of certain farmers and fishermen, up to a maximum of $2000 per farmer or fisherman, against the debtor, as provided in 11 U.S.C. S507(a)(5).

[ ] Deposits by individuals
Claims of individual up to a maximum of $900 for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. S507(a)(6).

[X] Taxes and Other Certain Debts Owed to Governmental Units
Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. S507(a)(7).

1 Continuation sheet attached

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

Creditor Name and Address	Date Claim was Incurred Consideration for Claim	Claim Amount and Notes*

[X] Debtor has no creditors holding unsecured nonpriority claims to report on this Schedule F.

No continuation sheets attached

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE G - EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Name and Address of Other Parties to Instrument	Notes of Contract or Lease and Debtor's Interest
Sun River Aparments 5100 N. La Canada Tucson, Arizona 85704	Contract type: Residential lease Terms: $385.00 per month for 9 months Beginning date: 8-1-92 Debtor's Interest: Co-Lessee Description: Apartment

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE H - CODEBTORS

Name and Address of Codebtor	Name and Address of Creditor

[X] Debtor has no codebtors.

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE I-CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

DEBTOR'S MARITAL STATUS: *Single*

DEPENDENTS OF DEBTOR AND SPOUSE: None

EMPLOYMENT:

	DEBTOR	SPOUSE
Occupation:	Ramp Agent	
Name of Employer:	America West Airlines	
How Long Employed:	5 years	
Employer Address:	Sky Harbor Airport Phoenix, AZ	

	DEBTOR	SPOUSE
INCOME:		
Current monthly gross wages, salary, and commissions	$ 1,516.67	$
Estimated monthly overtime	$ 433.33	$
SUBTOTAL	$ 1,950.00	$
LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	$ 520.00	$
b. Insurance	$ 32.50	$
c. Union dues	$ 0.00	$
d. Other:	$ 0.00	$
SUBTOTAL OF PAYROLL DEDUCTIONS	$ 552.50	$
TOTAL NET MONTHLY TAKE HOME PAY	$ 1,397.50	$
Regular income from operation of business or profession or farm (attach detailed statement)	$ 0.00	$
Income from real property	$ 0.00	$
Interest and dividends	$ 0.00	$
Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above.	$ 0.00	$
Social security or other government assistance	$ 0.00	$
Pension or retirement income	$ 0.00	$
Other monthly income	$ 0.00	$
TOTAL MONTHLY INCOME	$ 1,397.50	$
TOTAL COMBINED MONTHLY INCOME	$ 1,397.50	

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document:

NONE

In re: *FRANCISCO J. ESPINOSA* / Debtor Case No.

SCHEDULE J-CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

[ ] Check this box if a joint petition is filed and debtor's spouse maintains a separate household. Complete a separate schedule of expenditures labeled "Spouse".

Rent or home mortgage payment (include lot rented for mobile home)	$	370.00
Are real estate taxes included? Yes ___ No X		
Is property insurance included? Yes ___ No X		
Utilities: Electricity and heating fuel	$	60.00
Water and sewer	$	0.00
Telephone	$	75.00
Other	$	0.00
Home maintenance (repairs and upkeep)	$	0.00
Food	$	250.00
Clothing	$	35.00
Laundry and Dry cleaning	$	30.00
Medical and Dental expenses	$	35.00
Transportation (not including car payments)	$	125.00
Recreation, clubs, and entertainment, newspaper, magazines, etc.	$	50.00
Charitable contributions	$	0.00
Insurance (not deducted from wages or included in home mortgage payments)		
Homeowner's or renter's	$	10.00
Life	$	0.00
Health	$	30.00
Auto	$	55.00
Other	$	0.00
Taxes (not deducted from wages or included in home mortgages)	$	0.00
Installment payments: (Do not list payments to be included in the plan)		
Auto	$	0.00
Other	$	0.00
Alimony, maintenance, and support paid to others	$	0.00
Payments for support of additional dependents not living at your home	$	0.00
Regular expenses from operation of business, profession, or farm (attach detailed statement)	$	0.00
Other	$	0.00
TOTAL MONTHLY EXPENSES (Report also on Summary of Schedules)	$	1,125.00

FOR CHAPTER 12 AND 13 DEBTORS ONLY		
A. Total projected monthly income	$	1,397.50
B. Total projected monthly expenses	$	1,125.00
C. Excess income (A minus B)	$	272.50
D. Total amount to be paid into plan Monthly	$	272.50

FILED
Dec 7 1:30 PM '92
LEX L. O'BRIEN
CLERK
U.S. BANKRUPTCY COURT
DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re:

FRANCISCO J. ESPINOSA, S.S.# 349-68-6653 Date Filed:

92-3819 TUC LO

Case No:

Debtor

/

CHAPTER 13 PLAN

Attorney for Debtor: **JAMES L. ROBINSON, JR.**

DEBTOR'S PLAN UNDER CHAPTER 13

WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN

Debtor proposes the following Chapter 13 Plan:

1. **PROPERTY AND INCOME SUBMITTED TO THE PLAN:** Debtor shall submit the following amounts of property and future income to the Trustee for distribution under the Plan:

a. **Future earnings or income:** Debtor shall pay to the Trustee the sum of **Two Hundred Seventy Four Dollars ($274.00)** per month; on the 5th of the month, commencing January 5, 1993, and/or the Debtor will pay the first payment to the Trustee prior to the Confirmation Hearing.

Debtor is to make all of the Plan payments in the form of a cashier's check or money order payable to the Office of the Chapter 13 Trustee and shall include this Bankruptcy Case Number on each cashier's check or money order. Payments shall be sent to **Margo Itule, Chapter 13 Trustee, 177 North Church Avenue, Suite 900, Tucson, Arizona 85701**

b. **Other Property:** None. In the event that other property is submitted to the Trustee, it shall be treated as advance payments under paragraph 1.a., above.

c. **Adjustments to Property:** The current market value of Debtor's secured property and the proposed adjustments to secured creditors and the secured claims which are non-purchase money security interests to be avoided are set forth in the **Statement of Encumbered Property and Adjustments To List Of Secured Claims** which is attached hereto and incorporated herein.

2. **DURATION**: This Plan shall be for **sixty (60)** months including any months that payments are made to the trustee prior to the confirmation of the Plan. If at anytime before the end of this period all claims are paid, the Plan shall terminate.

3. **CLASSIFICATION AND TREATMENT OF CLAIMS**: Claims shall be classified as set forth below and these claims shall be paid by the Trustee (quarterly if the Trustee so desires) on the schedule set forth in the **Chapter 13 Debt Adjustment Plan** which is attached hereto.

a. **Administrative expenses**:

(1) **Trustee's fees and costs**: The trustee shall receive ten percent (10%) of each payment submitted pursuant to the Plan for her fees and costs.

(2) **Debtor's attorney's fees**: Debtor's attorney shall be paid his remaining fee of **$1,500.00** prior to the commencement on any claims listed hereinafter (except for any adequate protection payments which may be allowed by the Court at the confirmation hearing):

b. **Claims secured by real property**: None.

c. **Claims secured by personal property**: None.

(4) Claims treated as unsecured claims:

(a) Any claims not specifically set forth in this paragraph nor the attached **Statement of Encumbered Property and Adjustments To List of Unsecured Claims** are presumed to be unsecured claims. Any creditors, including but not limited to, Sears, Roebuck & Co., Montgomery Wards, J.C. Penny's & Co., and/or Radio Shack, claiming a security interest, shall serve a proof of claim, proof of a its perfected security interest, and an Objection to the Plan upon Debtor's counsel not later than seven (7) days prior to the first scheduled confirmation hearing date.

(b) If no proof of claim, proof of perfected security interest and objection to plan is filed and served on Debtor's counsel seven (7) days prior to the first scheduled confirmation hearing date then and in that event only the claims listed herein as secured loans shall be treated as secured loans.

(5) Claims paid as secured claims shall be paid in full prior to the commencement of payment on any claims listed thereafter.

(6) Upon payment of the above amount the security interest shall be released to Debtor.

d. **Priority Tax Claims:** There are no known tax claims.

(1) **Priority Tax Claims:** The following claims, as set forth below, shall be classified and paid as Priority claims:

(a) taxes on which returns (if required) were due within three years before the commencement of this case,

(b) taxes assessed within 240 days prior to the commencement of this case,

(c) taxes not assessed before, but assessable after the commencement of this case,

(d) taxes for which returns were not filed, or were filed late within two years before the commencement of this case,

(e) taxes under fraudulent returns.

(2) Priority claims shall be paid in full prior to the commencement of payment on unsecured claims. The amounts set forth below shall be adjusted to reflect the actual amounts allowed by the Court, and any increases shall reduce the amount payable on the unsecured claims.

(3) Any liens held by the taxing agencies listed below shall, upon completion of this Plan, be deemed extinguished and the liens shall be released.

(4) The debtor's initials indicate the correct status regarding filed or not filed income tax returns:

1E _____ I have to the best of my knowledge and belief filed all required federal and state income tax returns.

_____ _____ I have not filed all required federal and state income tax returns and I am aware that these returns must be prepared and filed immediately or I risk that my Chapter 13 proceeding will be dismissed.

(5) Description of priority claimants including the basis of claim and rate of interest are:

None.

Other priority claimants are: None. Student loan claims shall be paid as set forth in paragraph 3.e., below.

(6) **Other Tax Claims:** All other tax claims shall be classified and paid as unsecured claims, without any unpaid portion being discharged.

e. **Education Loan(s):** This plan shall pay the claims of **United Student Aid Funds, Inc., (also denominated in loan documents and collection letters as: United States Department of Education, Arizona Educational Loan Program, Valley National Bank, I.T.T. Technical Institute and General American Credits)** for four (4) student loans for educational loans in the following amounts:

(1) Amounts of loans:

$ 2,625.00
$ 2,625.00
$ 4,000.00
$ 4,000.00
$13,250.00 total

(2) These loans totaling $13,250.00 shall be paid in full as an unsecured claims all as set forth in the **Chapter 13 Debt Adjustment Plan** attached hereto.

(3) The amounts claimed by the United Student Loan Aid Funds, Inc., *et. al.* for capitalized interest, penalties, and fees shall not be paid for the reasons that the same are penalties and not provided for in the loan agreement between the Debtor and the lender.

(4) Any amounts or claims for student loans unpaid by this Plan shall be discharged.

f. **Codebtor Claims:** There are no co-debtors.

g. **Unsecured Claims:** All other claims shall be classified as unsecured along with any claims of security interest in property being avoided. Unsecured claims shall be paid the otherwise undistributed balance of payments under the Plan, pro rata all as set forth in the **Chapter 13 Debt Adjustment Plan.** Any unpaid amounts shall be discharged.

4. **LIQUIDATION ANALYSIS:** A liquidation analysis of Debtor's estate is attached hereto and the repayment to unsecured creditors will be 100%.

5. **REJECTION OF SECURED CLAIMS:** The Debtor elects not to assume a lease with or reaffirm a contract with the below named lessors or secured creditors and shall surrender to such lessors or creditors the collateral which is subject to lease or lien in full satisfaction of all claims which the lessor or creditor may have:

None.

6. **OBJECTIONS:** Objections, by any creditor, must be filed seven (7) days prior to the hearing on Confirmation of Plan along with a copy to the Trustee and Debtor's counsel.

7. **PROOFS OF CLAIM:** As a creditor you must file your proof of claim in order to get paid the amounts provided for in this plan. If you do not file your proof of claim by the deadline date you will not receive

anything even if the Plan provides for payment. The deadline for filing proofs of claim is set forth in the **Notice Of Commencement Case Under Chapter 13 Of The Bankruptcy Code, Meeting Of Creditors, And Fixing Of Dates** which you have received from the Clerk of the United States Bankruptcy Court.

8. **EFFECTIVE DATE AND VESTING:** The effective date of the Plan shall be the date of the order confirming the Plan. Property of the estate shall vest in the Debtor upon confirmation, including any income tax refunds. The Debtor may use the property in any manner, or may sell the property, without further order of this Court. Prior to and upon the Confirmation of the Plan, the automatic stay provided for by 11 U.S.C. Section 362 shall remain in full force and effect.

9. **SCHEDULE OF PAYMENTS:** The schedule of payments set forth in the **Chapter 13 Debt Adjustment Plan** attached hereto is an illustration of a likely payment schedule. The Trustee may make payments on a quarterly basis rather than a monthly basis. In the event of a conflict between that schedule and the provisions of this Plan, this Plan shall govern.

10. **OTHER PROVISIONS OF THIS PLAN:**

(a) The trustee may dismiss this Plan if Debtor incurs post-petition debts without the written permission of the trustee.

(b) The trustee shall have the power to waive, in writing and upon such terms as the trustee may impose and on such conditions as the trustee deems proper, any default in Debtor's payments to the Trustee under this Plan.

11. **SUPPORTING MEMORANDA:** Attached hereto and incorporated herein are the following memoranda and calculations:

(a) **Statement of Encumbered Property and Adjustments To List of Unsecured Creditors** and which sets forth:

(1) The fair market value of the Debtor's encumbered property.

(2) The secured claims that are greater than the fair market value of the secured property and the amount which is added to the list of unsecured claims.

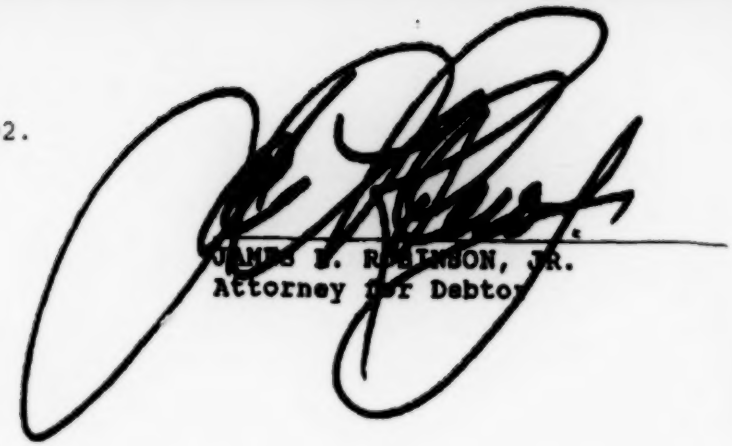
(3) Non-purchase money security interest to be avoided and to be added to the list of unsecured claims.

(4) Summary of the adjustments to the list of unsecured claims.

(b) **Liquidation Analysis** which sets forth an analysis if the Debtor's estate were liquidated and the percentage of their claims that the unsecured creditors will receive if this Plan is confirmed and which amount is higher than the unsecured creditors will receive if the estate is liquidated.

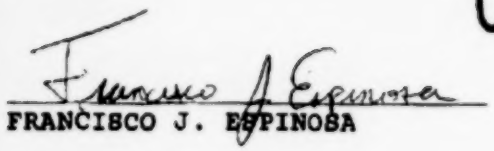
(c) **Chapter 13 Debt Adjustment Plan** which sets forth the repayment amounts and the schedule of payment dates.

Plan Date: December 4, 1992.



JAMES E. ROBINSON, JR.
Attorney for Debtor

APPROVED:



FRANCISCO J. ESPINOSA

UNITED STATES BANKRUPTCY COURT
FOR THE ARIZONA DISTRICT OF ARIZONA

In Re:
FRANCISCO J. ESPINOSA S.S.# 349-68-6653

Date Filed:
Case No:
Judge:
Debtor / CHAPTER 13

Attorney for Debtor: JAMES L. ROBINSON, JR.

STATEMENT OF ENCUMBERED PROPERTY AND ADJUSTMENTS TO LIST OF UNSECURED CLAIMS

Debtor(s) maintain that the following represents the fair market value of each article of encumbered property:

Property	Market Value
	0.00

The following secured claims are greater than the fair market value of the properties that secure them. Their unsecured portions are therefore added to the list of unsecured claims in the following amounts:

Creditor/Claim	Debt	Market Value	Unsecured Portion
NONE			

The following secured claims represent non-purchase money security interests and are hereby avoided pursuant to 11 USC 522(f)(2)(A). These claims are therefore added to the list of unsecured claims, in the following amounts:

Creditor/Claim	Debt
NONE	

Total adjustment to the Unsecured Claims:

	Total of Unsecured Claims per question 12c:	0.00
plus	Unsecured Portions of Secured Claims:	0.00
equals	Adjusted Total of Unsecured Claims:	0.00

LIQUIDATION ANALYSIS

Property	Fair Market Value	Liens	Debtor's Equity	Exempt Amount	Unexempt Amount
Real Property					
NONE					
Automobiles					
1984 Ford T-Bird	1,200.00	0.00	1,200.00	1,200.00	0.00
Household Goods					
NONE					
Personal Effects					
Clothing & Jewelry	575.00	0.00	575.00	575.00	0.00
Household & Personal property	540.00	0.00	540.00	540.00	0.00
Cash or Financial Accounts					
Sun River Apts., Rent Deposit	100.00	0.00	100.00	100.00	0.00
Other					
NONE					
Total:	2,415.00	0.00	2,415.00	2,415.00	0.00

SUMMARY

Total of Debtor's Equity:	2,415.00	
Total of Exempted Amounts:	2,415.00	
Balance remaining if estate is liquidated:	0.00	
Less administrative fees:	0.00	
Distribution to Priority Creditors:	13,250.00	
Available for distribution to unsecured creditors:	-13,250.00	
Actual total of unsecured claims:	0.00	
Percent Distribution under Chapter 7:	0.0%	
Available for Distribution under plan:	0.00	0.0%

CHAPTER 13 DEBT ADJUSTMENT PLAN

Creditor Name	Number of Payments	Payment Dates	Monthly Amounts	Total Payout
Payments Outside of Plan				NONE
Lump Sum Payments				
Attorney fees/costs	10	Month 1-10	150.00	1,500.00
				1,500.00
Secured Paid at 100%				NONE
Arrearages on secured claims				NONE
Secured, Paid at Mkt Val				NONE
Unsecured Paid at 100%				
United Student Aid Fund # 1	60	Month 1-60	Various	2,625.00
United Student Aid Fund # 2	60	Month 1-60	Various	2,625.00
United Student Aid Fund # 3	60	Month 1-60	Various	4,000.00
United Student Aid Fund # 4	60	Month 1-60	Various	4,000.00
				13,250.00
Unsecured Creditors				NONE

SUMMARY OF REPAYMENT PLAN

Debtor's pay period:	Monthly		
Number of pay periods in plan:	60		
Debtor's payment per pay period:	$ 274.00	Periods	1 to 60
Number of months in plan:	60		
Monthly Plan Income (After Trustee's fees):	$ 246.60	Months	1 to 60
Total plan funds (Before Trustee's Fee):	$ 16,440.00		
Trustee's fee:	$ 1,644.00		
Available for disbursement to creditors:	$ 14,796.00		
Outstanding Attorney Fees and Costs:	$ 1,500.00		
Priority Claims:	$ 13,250.00	$ 13,250.00#	
Payments on Debts that continue after the Plan:	$ 0.00		
Arrearages, including applicable interest:	$ 0.00		
Other Secured Claims:	$ 0.00	$ 0.00+	
Total:	$ 14,750.00		
Available for Unsecured Creditors:	$ 46.00		
Total Unsecured Claims:	$ 0.00	$ 0.00**	
Percentage Repayment of Unsecured Creditors:	100.0%		

\# As a double-check: Priority claims per 12a
\+ Fully secured claims per 12b, after adjustments for avoided claims
** Adjusted Unsecured per questions 12b, 12c

Form 13-2
PLAN ANALYSIS

Debtor: FRANCISCO J. ESPINOSA Case: _____
Prior: Bankruptcy ( ) Chapter 13 (X) Date _____
Estimated Length of Plan 60 months.

Trustee Use:
§341 Meeting Date: _____
Continued: _____
Confirmed Date: _____

TOTAL DEBT PROVIDED FOR UNDER THE PLAN AND ADMINISTRATIVE EXPENSES

A.	TOTAL PRIORITY CLAIMS	
	1. Unpaid attorney's fees	$ 1,500.00
	2. Taxes	$ 0
	3. Other	$ 13,250.00
B.	TOTAL OF PAYMENTS TO CURE DEFAULTS	$ 0
C.	TOTAL OF PAYMENTS ON SECURED CLAIMS	$ 0
D.	TOTAL OF PAYMENTS ON GENERAL UNSECURED CLAIMS	$ 0
E.	SUBTOTAL	$ 14,750.00
F.	TOTAL TRUSTEE'S COMPENSATION (10% of debtor's payments)	$ 1,644.00
G.	TOTAL DEBT AND ADMINISTRATIVE EXPENSES . . .	$ 16,394.00

RECONCILIATION WITH CHAPTER 7

H.	INTEREST OF GENERAL UNSECURED CREDITORS IF CHAPTER 7 FILED		
	1. Value of debtor's interest in non-exempt property	$ 0	
	2. Plus: value of property recoverable under avoiding powers	$ 0	
	3. Less: estimated Chapter 7 administrative expenses	$ 0	
	4. Less amounts payable to priority creditors other than costs of administration	$ 13,250.00	
	5. Equals: estimated amount payable to general unsecured creditors if Chapter 7 filed (if negative, enter zero)	$ 0	
I.	ESTIMATED DIVIDEND FOR GENERAL UNSECURED CREDITORS UNDER CHAPTER 7	$ 0	0 %
J.	ESTIMATED DIVIDEND UNDER PLAN	$ 0	100.0 %

JAMES L. ROBINSON, JR.
4810 NORTH CAMPBELL, SUITE 238
TUCSON, ARIZONA 85718
(602) 299-4922
Attorney for Debtor(s)

DNB 12-89 1W-59

USAP 5-1-89 9% A + 10.45 DY

FORM B91 6/90	United States Bankruptcy Court District of Arizona Case Number: 92-09819-TUC-AG	NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 13 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF
In re (Name of Debtor) ESPINOSA, FRANCISCO J	Address of Debtor 3100 N LA CANADA #57 TUCSON, AZ 85704 Date Filed December 7, 1992	Soc. Sec. No./Tax I.D. No. 349-68-[illegible]
Addressed:	Address of the Clerk of the Bankruptcy Court U.S. BANKRUPTCY COURT 110 S. CHURCH AVE, SUITE 8112 TUCSON, AZ 85701	
Name and Address of Attorney for Debtor JAMES L. ROBINSON, JR. 4320 N CAMPBELL #238 TUCSON, AZ 85718 Telephone Number (602) 299-4922	Name and Address of Trustee MARGO ITULE 177 N CHURCH #900 TUCSON, AZ 85701 Telephone Number (602) 624-8002	

FILING CLAIMS
Deadline to file a proof of claim: April 14, 1993

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS
January 14, 1993, 9:00 A.M., 110 S. Church Ave., Suite 5130, Monterrey Bldg., Tucson, Arizona 85701

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN
The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:
April 15, 1993, 10:30 A.M., 110 S. Church Ave., Suite 8-212, Acapulco Bldg., Tucson, Arizona 85701

COMMENCEMENT OF CASE. An individual's debt adjustment case under chapter 13 of the Bankruptcy Code has been filed in this court by the debtor or debtors named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor, or a protected codebtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor, or any codebtor, should review §§ 362 and 1301 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above in the box labeled "Date, Time, and Location of Meeting of Creditors" for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 13 FILING. Chapter 13 of the Bankruptcy Code is designed to enable a debtor to pay debts in full or in part over a period of time pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

Failure of the debtor or his attorney to appear at the Section 341(a) meeting or to timely file schedules, statements or plan shall result in dismissal. IF THE PLAN WAS NOT BEEN FILED OR IS NOT INCLUDED, IT WILL BE MAILED TO YOU AT A LATER DATE.

LITIGATION REC'D DEC 18 1992 BANKRUPTCY

FILED

For the Court: Kevin J. O'Brien, Clerk of Court
Clerk of the Bankruptcy Court

December 10, 1992
Date

DEC 10 1992

COPIES: SOC/PKT 1 POS
MASTER MAILING LIST
2 CPS MAILED
BY _____ D. CLERK

34

BEST AVAILABLE COPY

B-10 (Official Form 10)
(Rev. 5/91)

TUCSON

United States Bankruptcy Court
District of ARIZONA

PROOF OF CLAIM

In re (Name of Debtor)
FRANCISCO ESPINOSA

Case Number
92-03819-TUC-LO

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" of payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor
(The person or entity to whom the debtor owes money or property)
UNITED STUDENT AID FUNDS, INC.

Name and Address Where Notices Should be Sent
UNITED STUDENT AID FUNDS INC
P O BOX 6180
INDIANAPOLIS IN 46206-6180

Telephone No. (317)578-6534

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

FILED
JAN 08 1993
KEVIN E. O'BRIEN
U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

THIS SPACE IS FOR COURT USE ONLY

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:
349-68-6653

Check here if this claim: ☐ replaces ☐ amends a previously filed claim, dated: _____

1. BASIS FOR CLAIM

☐ Goods sold
☐ Services performed
☒ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other (Describe briefly)

☐ Retiree benefits as defined in 11 U.S.C. § 1114(e)
☐ Wages, salaries, and compensations (Fill out below)
Your social security number _____
Unpaid compensations for services performed
from _____ (date) to _____ (date)

2. DATE DEBT WAS INCURRED
3-1-89 - 8.00% (Adjusted) & 10.45% (Variable)

3. IF COURT JUDGMENT, DATE OBTAINED:

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.
CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM

☐ SECURED CLAIM $ _____
Attach evidence of perfection of security interest
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle ☐ Other (Describe briefly)

Amount of arrearage and other charges included in secured claim above, if any $ _____

☒ UNSECURED NONPRIORITY CLAIM $ 17,832.15 (includes interest)
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $ _____
Specify the priority of the claim.
☐ Wages, salaries, or commissions (up to $2,000), earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier) - 11 U.S.C. § 507 (a)(3)
☐ Contributions to an employee benefit plan - U.S.C. § 507 (a)(4)
☐ Up to $900 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507 (a)(6)
☐ Taxes or penalties of governmental units - 11 U.S.C. § 507 (a)(7)
☐ Other - 11 U.S.C. §§ 507 (a)(2), (a)(5) - (Describe briefly)

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED
$ 17,832.15 (Unsecured) + $ _____ (Secured) + $ _____ (Priority) = $ 17,832.15 ** (Total)

☐ Check this box if claim includes prepetition charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

Date
12-28-92

Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach power of attorney, if any)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

** Plus any interest that will accrue during the duration of the plan until the claim is paid in full.

STATEMENT OF PURCHASED ACCOUNT

Statement Date	Page Number
2/22/92	1

Account Identification	
Social Security Number	Loans Requested
847-68-6653	ALL

Code Definition *	Code
IRS Federal Offset	IO
State Offset	SO

ESPINOSA FRANCISCO
5100 N. LA CANADA 857
TUCSON, AZ 85704

UNITED STUDENT AID FUNDS INC
PO BOX 6180
INDIANAPOLIS IN 46206-6180
(317) 849-6510

ase notify us at once of any payments not shown on this statement.

* NUMERIC IS COLLECTION LOCATIO

nsaction Date		Gross Payments	Collection Costs	Other Charges	Date Interest Paid Thru			Interest Paid	Charge to Principal	Principal Due	C
Day	Year				Month	Day	Year				
19/92		AMOUNT PAID TO LENDER @			ADJUSTED INTEREST				$6,164.79	$6,164.79	
10/92		AMOUNT PAID TO LENDER @			VARIABLE INTEREST				$11,041.20	$17,205.99	

BORROWER MAY BE REPONSI[illegible] COLLECTION COSTS

Principal Due	Other Unpaid Charges	Daily Interest Rate	Accrued Interest	Collection Costs	Balance Due
17,205.99	0.00	3.62294	626.16	XXXXXXXXXXXXXXX	17,832.1
Principal Paid	**Other Charges Paid**	**Interest Paid**		**Collection Costs Paid**	**Total Paid**
0.00	0.00	0.00		0.00	0.0

unos Form 217 (Rev. 7/92)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

FILED
3 54 PM '93

IN RE	CHAPTER 13 NO. 92-3819-TUC-LO
FRANCISCO ESPINOSA	OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN
	Date: 4/15/93
	Time: 10:30 a.m.

To the Honorable Lawrence Ollason, Bankruptcy Judge: Comes Now, Margo Itule, Trustee of the above named debtor(s) and respectfully submits as follows:

The Chapter 13 plan filed in the above named case should not be confirmed for the following reasons:

1) Pursuant to 11 USC sec. 507, Trustee objects to the classification of the debtor's student loans as priority claims. Trustee requests amendment to reclassify these debts.

Remarks:

It is required the debtor(s) report any change of income to the Trustee. The Trustee requires an annual statement of income and expenses be submitted to her office.

Date 3-30-93

Margo Itule

Margo Itule, Trustee

Copies mailed to the following on: 3-30-93

Debtor(s): Francisco Espinosa 5100 N. La Canada #57 Tucson, Arizona 85704
Attorney for debtor(s): James Robinson St. Phillips Plaza 4320 North Campbell Suite 238 Tucson, Arizona 85718

lmr

TRUSTEE'S CONFIRMATION WORK SHEET Margo Shu

Attorney Daniel L Patterson Confirmation Hearing Date 4/[illegible]

Debtor Name Francisco Espinoza Case No. 92-3817 TUC

CONFIRM _____ NOT CONFIRM X Petition filed 2/7/92 Plan filed 2/7/

Monthly Budget

Income	$ 1317.50	Total Unsec. Listed	$ 0
Expense	$ 1145.00	Deficiencies	$ 0
Surplus	$ 172.50	Dischg. Tax	$ 0
		_____	$ 0
		Total	$ 0
		Amt. Paying Unsec. in Plan	$ 0
		Liquidation Value	$ 0

Proposed $ 274.- Per Month

60 Months $ 16,440.- Total

ACTUAL PLAN SUMMARY		ERRATA	CHANGES PER _____
Mortgage Arrears	$ 0		
Est. Court Costs	$ 40.00		
Other Secured Loans	$ 13200.00		
Secured	$ 0		
Unsecured	$ 0		
Priority	$ 0		
Attorney	$ 150.00		
SUB TOTAL	$ 14790.00		
Trustee	$ 1644.00		
TOTAL	$ 16,440.00		

REMARKS:

Pursuant to 11USC sec 507, Trustee objects to the classification of the debts stated here as priority claims. Trustee requests amendment to reclassify these debts

SEE

FILED

APR 21 PM '93

KEVIN E. O'NEIL
CLERK
U.S. BANKRUPTCY COURT
DISTRICT OF ARIZONA

LAW OFFICE OF JAMES L. ROBINSON, JR.
St. Philip's Plaza, 4320 North Campbell, Suite 238
Tucson, Arizona 85718 (602) 299-4922
PCB #48612 - ARIZ. BAR #3184

Attorney for Debtor.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	
FRANCISCO ESPINOSA,	In Proceedings Under Chapter 13
	Case No. 92-3819-TUC-LO
Debtor.	**AMENDMENT TO DEBTOR'S SCHEDULES E and F**

COMES NOW, the Debtor, by and through counsel undersigned, and hereby amends the classification of his student loan as listed in Schedule E - "Creditors Holding Unsecured Priority Claims". The classification of the student loan should be listed in the debtor's Schedule F - "Creditors Holding Unsecured Nonpriority Claims". The classification will not affect the obligation for the student loan which shall be paid 100% through the Debtor's Plan.

DATED THIS 9th day of April, 1993.

JAMES L. ROBINSON, JR.
Attorney for Debtor

Original and ~~two~~ 2 copies filed with the Clerk of the United States Bankruptcy Court this ~~9th~~ 21st day of April, 1993.

Copy of the foregoing mailed/
hand delivered this 9th day
of April, 1993 to:

Margo Itule, Chapter 13 Trustee
177 North Church Avenue, Suite 900
Tucson, Arizona 85701

By: Jean M. Shanks

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA
MINUTES

FILED

APR 15 1993

KEVIN E. O'BRIEN
U. S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

Hearing Officer: MARGO ITULE
Hearing Room: 5-230
Clerk: KAY HONEMAN
Court Reporter: JUANITA GASTELO
Date/Time: APRIL 15, 1993 - 10:30 A.M.
Case Number: 92-03819
Case Name: ESPINOSA, FRANCISCO J

Chapter: 13

SUBJECT OF HEARING:

CONFIRMATION OF PLAN

APPEARANCES:

J. ROBINSON, ATTORNEY FOR DEBTORS

PROCEEDINGS:

ATTORNEY FOR DEBTOR STATES PLAN CAN BE CONFIRMED WITH A STIP & ORDER

TRUSTEE RECOMMENDS: PLAN BE CONFIRMED WITH STIP AND ORDER WITH DEBTOR/TRUSTEE. TRUSTEE HAS RECEIVED THE S/O ALREADY.

10F7

LAW OFFICE OF JAMES L. ROBINSON, JR.
St. Philip's Plaza, 4320 North Campbell, Suite 238
Tucson, Arizona 85718 (602) 299-4922
PCB #48612 - ARIZ. BAR #3184

Attorney for Debtor.

FILED
MAY - 6 1993
KEVIN E. O'BRIEN, CLERK
UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

LODGED
KEVIN E. O'BRIEN, CLERK
U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

MAY - 3 1993

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re FRANCISCO ESPINOSA, Debtor.	In Proceedings Under Chapter 13 Case No. 92-3819-TUC-LO **ORDER CONFIRMING CHAPTER 13 PLAN**

UPON STIPULATION AND AGREEMENT between the Debtor and the Chapter 13 Trustee, MARGO ITULE, that the Trustee shall withdraw her objection to Debtor's Chapter 13 Plan upon the debtor's reclassification of his student loan claim from a Schedule E - priority claim to Schedule F - general unsecured claim to be paid 100% through the debtor's plan, and there being no other objection to the Debtor's Plan and good cause appearing,

THE COURT FINDS AS FOLLOWS:

1. The Debtor's Chapter 13 Plan has been accepted in writing or is deemed to have been accepted by the creditors whose acceptance is required by law.

2. The Plan has been proposed, and its acceptance procured, in good faith and not by any means, promises or acts forbidden by law.

3. The Plan is for the best interest of the creditors and is feasible taking into account the Statement filed by the

Debtor.

4. The Debtor has not been guilty of any of the acts or has not failed to perform any of the duties which would be a bar to the discharge of the bankruptcy.

5. The value, as of the effective date of the Plan, of property to be distributed under the Plan to each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the Debtor were liquidated under Chapter 7, Title 11, United States Code, on such date.

IT IS ORDERED that the forgoing stipulation between the Debtor and the Chapter 13 Trustee is approved,

IT IS FURTHER ORDERED that the Debtors' Chapter 13 Plan is approved and the Debtors are ordered to comply therewith.

DONE IN OPEN COURT this _____ day of _____, 1993.

MAY 6 1993

THE HONORABLE LAWRENCE OLLASON
United States Bankruptcy Judge

RESPECTFULLY SUBMITTED this 30th day of April, 1993.

JAMES L. ROBINSON, JR.
Attorney for Debtor

APPROVED this 28th day of April, 1993:

MARGO PIULE, CHAPTER 13 TRUSTEE

FILED
JUN 10 3 14 PM '93
KEVIN J. O'BRIEN
U.S. BANKRUPTCY COURT
DISTRICT OF ARIZONA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re:

FRANCISCO ESPINOSA

Debtor (s)

CHAPTER 13 NO: 92-03819 LCO

TRUSTEE'S NOTICE TO CREDITOR

Margo Trule, Standing Chapter 13 Trustee of the above captioned Chapter 13 Bankruptcy acknowledges the following claim:

Claim #: 1 Filed on: 01/08/93, for $ 17832.15 by or on behalf of:

Name: UNITED STUDENT AID FUNDS INC.
Address: P.O. BOX 6180
INDIANAPOLIS IN 46206-6180

This claim will be treated as follows:

___ 1. This debt is listed for payment outside the Chapter 13 plan and will not be paid by the Trustee.

___ 2. The claim is not listed for payment in the schedules or in the Chapter 13 plan and will not be paid through the plan.

___ 3. The claim cannot be identified from the schedules or the plan. If adequate supporting documentation is provided to the Trustee, allowing her to identify the claim as valid on or before 30 days from this mailing, the claim may be paid.

XX 4. The amount of the claim filed differs from the amount listed for payment in the plan. Your claim will be paid as listed in the plan. Unsecured claims not specifically identified in the plan will be paid at the amounts listed in the schedules.

If an interested party wishes to dispute the above stated treatment of the claim, it is the responsibility of the party to initiate the dispute.

The claim will be treated as indicated above unless the Trustee receives within 30 days from this mailing, a written request for different treatment. The request should set forth the specific grounds for alternative treatment and should be filed with the Clerk of the Court, with a copy mailed to the Trustee at 177 N. Church Ave., Suite #700, Tucson, Arizona 85701.

13K

On this day, a true and exact copy of this notice has been forwarded to the claimant, and the following:

Debtor(s): FRANCISCO ESPINOSA, 5100 N. LA CANADA #57, TUCSON AZ 85704
Attorney for debtor(s): JOHN L. ROBINSON, ST PHILIP'S PLAZA, 4220 N. CAMPBELL STE. #238, TUCSON, AZ 85718

Dated: JUNE 10, 1993

Margo Itule

Margo Itule, Trustee

UNITED STATES BANKRUPTCY COURT
District of Arizona, Tucson Division

FILED

MAY 30 1997

KEVIN E. O'BRIEN
U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re:
ESPINOSA, FRANCISCO J
2930 N 38TH ST #11
PHOENIX, AZ 85018

DSSAN: *349-68-6653*

Case No. *92-03819-TUC-LO*

Date Filed *Dec. 7, 1992*
Chapter *13*

DISCHARGE OF DEBTOR(S)

The debtor(s) having filed a Chapter 13 petition, the court finds that the debtor(s') plan has been confirmed; that the debtor(s) have fulfilled all requirements under the plan; that all allowed claims have been satisfied in accordance with the plan; and that with respect to any secured claims which continue beyond the term of the plan, any pre-petition or post-petition defaults have been cured and such claims are current with no late charges, costs or attorney's fees owing. IT IS ORDERED THAT:

1. Pursuant to 11 USC §1328(a), the debtor(s) are discharged from all debts provided for by the plan or disallowed under 11 USC §502, except any debt:

(a) provided for under 11 U.S.C. §1322(b)(5) and on which the last payment is due after the date on which the final payment under the plan was due;

(b) in the nature of alimony to, maintenance for, or support of a spouse, or child of the debtor in connection with a separation agreement, divorce decree or other order of a court of record, or property settlement agreement, as specified in 11 USC §523(a)(5);

(c) for a student loan or educational benefit overpayment as specified in 11 U.S.C. §523(a)(8);

(d) for a death or personal injury caused by the debtor(s)' unlawful operation of a motor vehicle while intoxicated from using alcohol, a drug, or another substance, as specified in 11 U.S.C. §523(a)(9), in case filed on or after November 15, 1990;

(e) for restitution included in a sentence on the debtor(s)' conviction of a crime, in case filed on or after November 15, 1990; or

(f) for a fine included in a sentence on the debtor(s)' conviction of a crime, in a case commenced on or after October 22, 1994.

2. Pursuant to 11 USC §1328(d), the debtor(s) are not discharged from any debt based on an allowed claim filed under 11 USC §1305(a)(2) if prior approval by the trustee of the debtor('s) incurring such debt was practicable and was not obtained.

#02

3. Notwithstanding the provisions of Title 11, United States Code, the debtor(s) are not discharged from any debt made non-dischargeable by 18 USC §3613(f), by certain provisions of titles 10,37,38,42, and 50 of the United States Code, or by any other applicable provision of law.

4. All creditors are prohibited from attempting to collect any debt that has been discharged in this case. Creditors who hold secured claims which continue beyond the term of the plan shall take no action inconsistent with the above findings.

Dated: May 30, 1997

HONORABLE Lawrence Ollason
United States Bankruptcy Judge

Asset Case

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: FRANCISCO J. ESPINOSA, Debtors.	Chapter 13 Case No. 4-92-03819-EWH ORDER

The Ninth Circuit Court of Appeals has remanded this case to the United States District Court for the District of Arizona, for that court in turn to remand it to this Court. The purpose of the remand was limited to consideration by this Court whether, under Federal Rule of Civil Procedure 60(a) the Discharge Order in this Case entered May 30, 1997, Docket 47, should be corrected to remove therefrom the prohibition against discharging Student Loans.

The Court has considered the motion of the Debtor, and the response of the student loan creditor, and finds that the inclusion of paragraph 1(c) in the Discharge Order was inserted because of a clerical mistake, because it was the clear intent of the Court, as reflected in the Chapter 13 Plan, ~~and the Order confirming that Plan~~ As approved by the Court, that all student loan-related obligations were to be discharged if the debtor successfully performed and completed the Plan.

Therefore:

IT IS ORDERED striking paragraph 1(c) of the Discharge Order, Docket 47.

IT IS FURTHER ORDERED that Debtor be, and he hereby is, discharged from all obligations of any nature whatsoever arising from or related to the Student Loans listed in Debtor's Petition and Schedules.

aug 20, 2008

Edward Holland

United States Bankruptcy Judge

(9)

No. 08-1134

SUPREME COURT, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

R. TED CRUZ
ALLYSON N. HO
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street
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Houston, Texas 77002
(713) 890-5000

DAVID B. BOODT
JONI M. ANDERSON
JULIE E. RAGSDALE
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CHARLES W. WIRKEN
Counsel of Record
MADELEINE C. WANSLEE
SEAN P. O'BRIEN
GUST ROSENFELD P.L.C.
201 East Washington
Suite 800
Phoenix, Arizona 85004
(602) 257-7959

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Student loans are statutorily nondischargeable in bankruptcy unless repayment would cause the debtor an "undue hardship." Debtor failed to prove undue hardship in an adversary proceeding as required by the Bankruptcy Code and Rules, and instead, merely declared a discharge in his Chapter 13 plan. Are the orders confirming the plan and discharging debtor void?

2. Bankruptcy Rules permit discharge of a student loan only through an adversary proceeding, commenced by filing a complaint and serving it and a summons on an appropriate agent of the creditor. Instead, debtor merely included a declaration of discharge in his Chapter 13 plan and mailed it to creditor's post office box. Does such procedure meet the rigorous demands of due process and entitle the resulting orders to respect under principles of *res judicata*?

RULE 29.6 STATEMENT

Petitioner United Student Aid Funds, Inc. is a private nonprofit corporation established under the laws of the State of Delaware. It has no parent company, and no publicly held company holds any membership interest in it. Its members are the individuals on its Board of Trustees.

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TRENDS IN STUDENT AID 2008, COLLEGE BOARD, October 2008, http://professionals.collegeboard.com/profdownload/trends-in-student-aid-2008.pdf 49

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1, 28, 51) are reported at 530 F.3d 895, 545 F.3d 1113, and 553 F.3d 1193. The opinions of the district court (Pet. App. 60) and the bankruptcy court (Pet. App. 71) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2008. The judgment was amended and a petition for rehearing was denied on December 10, 2008. The petition for a writ of certiorari was filed on March 10, 2009 and granted on June 15, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

11 U.S.C. § 102. Rules of construction.

11 U.S.C. § 523. Exceptions to discharge.

11 U.S.C. § 1322. Contents of plan.

11 U.S.C. § 1325. Confirmation of plan.

11 U.S.C. § 1327. Effect of confirmation.

11 U.S.C. § 1328. Discharge.

See Appendix, *infra*, for pertinent text of statutes.

STATEMENT

Espinosa's Bankruptcy Petition

In 1988, respondent Francisco J. Espinosa obtained four student loans totaling $13,250. J.A. 16. The loans were made through the Federal Family Education Loan Program ("FFEL Program") and were guaranteed by the federal government.

In December 1992, Espinosa filed a Chapter 13 bankruptcy petition. J.A. 5. Chapter 13 facilitates the adjustment of the debts of an individual with regular income through a repayment plan funded from future income. 8 COLLIER ON BANKRUPTCY ¶ 1322.01, p. 1322-6 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2009) (hereinafter "COLLIER'S"). Chapter 13 is "intended * * * [t]o function as the primary rehabilitation chapter for individual consumer debtors." CHARLES J. TABB, THE LAW OF BANKRUPTCY 895 (1997).

The schedules to Espinosa's bankruptcy petition listed as his only debts his student loans totaling $13,250. J.A. 7, 15-16. At the time of filing, Espinosa's notes were held by petitioner United Student Aid Funds, Inc. ("USA Funds") as guarantor because the loans were in default. Bankr. Dkt. 31 at 2 & 32 at 2; Dist. Dkt. 5 at 3, 6. USA Funds is the largest

educational loan guaranty agency under the FFEL Program.[1]

Notice to Creditors

The bankruptcy petition and its schedules are not sent to creditors. Instead, creditors receive a separate notice of the filing of the bankruptcy case. The Bankruptcy Code requires notice of the "order for relief," which is the stay order that is automatically entered upon filing of the bankruptcy petition. 11 U.S.C. § 362. "In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk * * * give[s] notice by mail of the order for relief within 20 days." FED. R. BANKR. P. 2002(o). The notice is normally given through the mailing of the appropriate version of Official Bankruptcy Form 9, which also includes notice of the first meeting of creditors, certain deadlines, and other case information. That form "is often the first notice that most creditors receive that a bankruptcy case has been filed." 3 COLLIER'S ¶ 341.02[2], pp. 341-7.

That form notice was mailed in this case. Bankr. Dkt. 5; J.A. 34. With regard to the bankruptcy petition and its schedules, it stated: "You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court." *Ibid.*

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[1] http://www.finaid.org/loans/guaranteeagencies.phtml.

Espinosa's Plan

A Chapter 13 debtor is required to file a "plan" either with the bankruptcy petition or shortly thereafter. 11 U.S.C. § 1321; FED. R. BANKR. P. 3015(b). The plan proposes the amounts of the monthly payments that the debtor will make to the trustee, which creditors will be paid, how much they will be paid, and over what period of time payments will be made. See 11 U.S.C. § 1322. There is no official form for a plan. Some elements of the plan are required by statute. 11 U.S.C. § 1322(a). Other content is permitted to the extent "not inconsistent with this title." *Id.* § 1322(b)(11).

Espinosa's plan, filed at the same time as his bankruptcy petition, classified his student loan debts as unsecured priority claims and provided for payment of only the principal amount of his loans ($13,250) over the maximum allowable period of sixty months. J.A. 23, 26, 31-32. The plan declared that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." J.A. 26. In other words, according to the plan, all accrued and post-petition interest would be discharged.

Student loans are, by statute, nondischargeable except in demonstrated circumstances of "undue hardship." 11 U.S.C. § 1328(a)(2 Espinosa's plan did not assert that he would suffer undue hardship if the interest on his student loans were not discharged. Instead, his plan simply declared a discharge.

To determine whether a presumptively nondischargeable debt may be discharged, the Bankruptcy Rules require a separate action termed an adversary proceeding. FED. R. BANKR. P. 7001(6). An adversary proceeding is commenced by filing a complaint. FED. R. BANKR. P. 7003. Notice is given by serving the complaint with a summons. FED. R. BANKR. P. 7004. In this case, Espinosa did not file a complaint seeking a determination that paying his student loan debt would cause him undue hardship.

Notice of the Plan

The Bankruptcy Rules require that either the plan or a summary of it be mailed to creditors along with the notice of the hearing to confirm the plan. FED. R. BANKR. P. 3015(d). The mailing addresses used by the clerk are those on a list provided by the debtor. FED. R. BANKR. P. 1007(a). The address provided for USA Funds by Espinosa was the post office box address used to receive loan payments. Bankr. Dkt. 2.

A copy of Espinosa's plan was mailed to (and received by) USA Funds at that address. J.A. 34. Espinosa did not serve the plan on an officer of USA Funds, a managing or general agent, or other agent authorized to receive service of process. Bankr. Dkt. 32 at 3; Dist. Dkt. 5 at 3. A summons and complaint in an adversary proceeding against a corporation like USA Funds must be so served. FED. R. BANKR. P. 7004(b)(3).

Objections to the Plan

After a Chapter 13 plan is submitted, creditors may object to its confirmation. 11 U.S.C. § 1324. The trustee also has the right to object. *Id.* § 1325. The court may also object to prevent an abuse of process. *Id.* § 105(a).

Objections to confirmation of a plan must be filed before the plan is confirmed. FED. R. BANKR. P. 3015(f). Espinosa's plan provided that any creditor's objections must be filed seven days before the confirmation hearing, J.A. 26, thus purporting to impose an affirmative duty on creditors to object. USA Funds filed no objection.[2]

The trustee did file an objection, asserting that Espinosa had misclassified his student loan debts as priority claims, and requesting that the plan be amended to reclassify the debt. J.A. 37-38. Espinosa amended his schedules to list his student loans as "unsecured nonpriority claims." J.A. 39. The amendment stated that the reclassification would "not affect the obligation for the student loan which shall be paid 100% through the Debtor's Plan." *Ibid.*

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[2] Because the plan reflected that all of Espinosa's disposable income would be applied to his student loan debt for the statutory maximum plan duration of sixty months, J.A. 22, 32, USA Funds could not have obtained any greater plan payment by objecting to the plan.

USA Funds' Claim

A holder of a nondischargeable debt is not required to file a claim in the debtor's bankruptcy case. *Grynberg* v. *United States* (*In re Grynberg*), 986 F.2d 367, 370 (10th Cir. 1993). The creditor may either file a claim or choose to wait until the conclusion of the bankruptcy proceeding to bring suit on its claim in another forum. *Ibid.*

USA Funds filed a proof of claim for $17,832 as an unsecured non-priority claim. J.A. 35-36. That amount included pre-petition interest. *Ibid.* Neither the trustee nor Espinosa objected to the claim. A claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a); FED. R. BANKR. P 3001(f).

Confirmation of the Plan

Whether or not any objection is made, the bankruptcy court is required to evaluate the plan under the standards of 11 U.S.C. § 1325. If the plan complies, and the court determines it is feasible for the debtor to complete it, the plan will be confirmed. *Ibid.*

At Espinosa's plan confirmation hearing, he did not prove or attempt to prove the requisite elements of undue hardship, and there was no determination by the bankruptcy court of undue hardship. J.A. 41. In the absence of any objection, the court entered an order confirming the plan. J.A. 42-43. The confirmation order made no finding of undue hardship.

After the plan was confirmed, the trustee gave notice to USA Funds that its claim, which differed in amount from that listed for payment in the plan, would be paid according to the plan. The notice further stated that the claim would be "treated as indicated" unless the trustee received a request within 30 days for different treatment. J.A. 44-45. USA Funds made no such request.

Espinosa's Discharge

Espinosa paid his only obligation under the plan, and a standard discharge order was entered on May 30, 1997 that both specifically and generally excepted his student loans from discharge:

> 1. [T]he debtor(s) are discharged from all debts provided for by the plan * * * except any debt * * *
>
> (c) for a student loan * * * as specified in 11 U.S.C. § 523(a)(8) * * * *
>
> 3. Notwithstanding the provisions of Title 11, United States Code, the debtor(s) are not discharged from any debt made nondischargeable by * * * any * * * applicable provision of law.

J.A. 46-47. The discharge order enjoined creditors from taking action to collect any discharged debt. J.A. 47.

Although the discharge order expressly excepted Espinosa's student loan debts from discharge, he did not move to correct the order or appeal from it.

Post-Discharge Proceedings

Espinosa's loans were subrogated to the U.S. Department of Education under a reinsurance agreement with USA Funds. Bankr. Dkt. 32 at 4; Dist. Dkt. 5 at 6. In 2000, the Department of Education began collection efforts and caused the Treasury Department to intercept Espinosa's federal income tax refunds. Bankr. Dkt. 26 at 2; 28 at 4. In 2003, Espinosa filed motions in the bankruptcy court seeking to reopen the case and alleging that the discharge injunction had been violated. Bankr. Dkt. 26, 29.

In 2004, USA Funds recalled the loans from the Department of Education, Dist. Dkt. 5 at 6, and moved under Federal Rule of Civil Procedure 60(b)(4) for relief from the confirmation order on the ground that it is void. Bankr. Dkt. 32. The bankruptcy court ruled for Espinosa. Pet. App. 71. USA Funds appealed to the district court, which reversed, ruling that the confirmation order was void for lack of due process and therefore had no *res judicata* effect. Pet. App. 60.

A panel of the Ninth Circuit remanded to the bankruptcy court for a determination whether the exclusion of Espinosa's student loan debt from the discharge order was a clerical error. Pet. App. 51. The bankruptcy court ruled that it was and entered an order discharging the balance of Espinosa's student

loan debt – still without making any determination of undue hardship. J.A. 48.

The Ninth Circuit then reversed the district court. Pet. App. 28. The court first held that USA Funds' statutory argument – that the plain text of the Bankruptcy Code and Rules precludes discharging student loan debt – was "foreclosed" by Ninth Circuit precedent that was "on all fours" with this case. Pet. App. 32-41 (citing *Great Lakes Higher Educ. Corp.* v. *Pardee* (*In re Pardee*), 193 F.3d 1083, 1086 (9th Cir. 1999) (holding that a debtor may discharge a student loan merely by including it in a Chapter 13 plan, without commencing an adversary proceeding and without proving or even alleging undue hardship)).

Bound by its prior ruling in *Pardee*, the court of appeals dismissed the statutory argument and turned next to the constitutional argument. Reversing the district court, the panel concluded that due process does not require compliance with the congressionally mandated procedures for discharging student loan debts, namely proof of undue hardship through an adversary proceeding. Pet. App. 41-48.

The Ninth Circuit therefore held that the order confirming Espinosa's plan was valid and final, and that his remaining student loan debt was discharged by the amended discharge order. Pet. App. 48-49.

In a concluding dictum, the panel admonished all future bankruptcy courts in the Ninth Circuit that courts "*have no business standing in the way*" by refusing to "confirm plans that seek to discharge

student loan debts without an adversary proceeding, even when the creditor fails to object to the plan." Pet. App. 48-49 (emphasis added).

After USA Funds filed a petition for rehearing, the court of appeals panel amended its opinion. The court of appeals denied en banc review. Pet. App. 1.

SUMMARY OF ARGUMENT

In 1958, in an effort to expand post-secondary educational opportunity to as many Americans as possible, Congress established the first federally sponsored student loan program. In the fifty-one years since, Congress has repeatedly expanded the availability of federally guaranteed student loans, resulting in an historic increase in college attendance for students who could not otherwise afford higher education.

Hand-in-hand with that expansion of federally guaranteed student loans, Congress has over and over again narrowed the circumstances under which those loans can be discharged in bankruptcy. Recognizing that abuse of the bankruptcy process drives up the costs for all student borrowers – and for the taxpayers guaranteeing those loans – Congress has mandated that student loans can be discharged only upon a demonstration of "undue hardship," which, under the Bankruptcy Rules, can be made only through an "adversary proceeding" where the debtor bears the burden of proof.

Notwithstanding that congressional mandate, in the instant case, the Ninth Circuit approved a different means of discharging student loan debt: what is known as "discharge by declaration." According to the Ninth Circuit, a debtor may simply list student loan debts in his or her Chapter 13 bankruptcy plan, and, if the creditor fails to affirmatively object, the bankruptcy court must confirm the plan and, upon completion of its terms, discharge the debt.

The Ninth Circuit rule is in direct contravention of the plain text of both the Bankruptcy Code and the Bankruptcy Rules. Moreover, if judicially approved, discharge by declaration would frustrate the expressed will of Congress and would facilitate the discharge of a host of debts that Congress has deemed nondischargeable. And it would impose dramatic burdens on litigants and the judicial system, with no countervailing benefits.

Congress has expressly exempted student loans from discharge in bankruptcy. 11 U.S.C. § 1328(a)(2). Equally unequivocal is the sole statutory exception to this rule: student loan debt is nondischargeable "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8).

The Bankruptcy Rules, in turn, provide that "undue hardship" may be determined only through an "adversary proceeding," which, like a civil lawsuit, must be commenced by the debtor filing a complaint and serving a summons. FED. R. BANKR. P. 7001,

7003-04. The debtor then has the burden of proving "undue hardship" in the adversary proceeding to rebut the presumption of nondischargeability.

Discharge by declaration – allowing the discharge of student loan debt with neither an adversary proceeding nor a judicial finding of "undue hardship" – is irreconcilable with the plain text of the Bankruptcy Code and Rules.

Indeed, Congress has further prohibited the inclusion of discharge by declaration provisions in plans by expressly prohibiting any provisions that are inconsistent with the Bankruptcy Code. 11 U.S.C. § 1322(b)(11). Moreover, Congress also forbids courts from confirming plans that do not comply with the Bankruptcy Code. 11 U.S.C. § 1325(a). Consequently, an order confirming a plan that purports to discharge a student loan by mere declaration, and the subsequent discharge order, are doubly beyond the court's authority and therefore void in that regard.

Because the exception of student loans from discharge is self-executing, a creditor has no duty to object to a plan proposing a discharge by declaration. Instead, the creditor is entitled to wait for the debtor to bring the required adversary proceeding.

If a court confirms a discharge by declaration plan and thereafter discharges a student loan without an adjudication of undue hardship, such orders are not final and binding on the creditor. Being void orders, *res judicata* does not bar a direct attack by a Rule 60(b)(4) motion. Furthermore, *res judicata* has

no application because the issue of undue hardship was never adjudicated on the merits and the creditor was never given the requisite full and fair opportunity to litigate the issue by adversary proceeding.

The Ninth Circuit ruled to the contrary because it refused to accord force to the congressional mandate once the discharge by declaration had been memorialized in a confirmation order. But that reasoning proves too much. If the Ninth Circuit's analysis is correct, it would apply not just to student loans, but also to all of the other types of debts that Congress has also deemed nondischargeable, including state and federal taxes, child support, alimony, drunk driving related personal injury and death judgments, and criminal fines and restitution orders. Such an outcome is inconsistent with the text and manifest purpose of the Bankruptcy Code.

And it would accomplish no meaningful purpose. If the Ninth Circuit rule were adopted nationwide, attempts at discharge by declaration for all these nondischargeable debts would predictably become commonplace. Some creditors – for example, some recipients of alimony or child support or some victims of drunk driving accidents – would no doubt be caught unawares, and inadvertently lose the protection granted by Congress. And other more sophisticated creditors – such as large student loan guarantors and lenders and state and federal government agencies – would no doubt have to expand their efforts to review in detail every bankruptcy plan

and to interpose *pro forma* objections in countless proceedings to protect their rights.

Once those objections were made, all of them – 100 percent – would be sustained because discharge by declaration is contrary to the plain text of the Bankruptcy Code. So, the necessary result of the Ninth Circuit's rule with respect to student loans, if approved, would be (1) the expenditure of substantial sums on lawyers throughout the nation, (2) the resultant higher costs for student loan agencies, which costs would ultimately be borne by student loan borrowers or the taxpayer, and (3) the additional burden on the judicial system to consider and sustain the deluge of *pro forma* objections to attempted discharges by declaration. These results would be amplified exponentially when the Ninth Circuit's rule is applied to the other nondischargeable debts. And, at the end of that considerable time and effort, the out-come would be – to return to *status quo ante*, if only the text of the statute had been enforced in the first place.

That makes no sense. Congress has determined the necessary predicate for discharging student loans, and courts should give force to that congressional mandate. Demanding that creditors make *pro forma* objections before enforcing the congressional requirements for discharge furthers no purpose in the statute, and only imposes dead-weight losses on the parties and the court system.

Indeed, discharge by declaration is not only inconsistent with the statutes, it is also contrary to the constitutional safeguards of due process. Although Congress could surely have allowed discharge of student loans with lesser procedural protections, once Congress specifies heightened procedural protections, the Constitution prohibits depriving persons of property without the process that is due. Congress specified the process that was due – here, a judicial determination of "undue hardship" in the adversary proceeding required by the Bankruptcy Rules – and discharging a student loan debt with anything less runs afoul of the protections of due process.

ARGUMENT

I. STUDENT LOAN DEBT IS NOT DISCHARGEABLE IN BANKRUPTCY ABSENT A SHOWING OF UNDUE HARDSHIP IN AN ADVERSARY PROCEEDING.

Under Title 11, section 1328(a)(2), student loan debt is nondischargeable in bankruptcy unless repayment would cause the debtor an "undue hardship." Espinosa did not even attempt to prove undue hardship in an adversary proceeding as required by the Bankruptcy Code and Rules and, instead, merely declared a discharge in his Chapter 13 plan. In every other circuit to have considered the issue – other than the Ninth Circuit – orders confirming the plan and discharging the debtor without a judicial finding of undue hardship would have been deemed void. The

text, purpose, and history of the Bankruptcy Code compel that result and require reversal of the court of appeals' contrary conclusion.

A. The Text of the Bankruptcy Code Makes Clear That Student Loans Are Nondischargeable Without a Finding of Undue Hardship.

Interpretation of the Bankruptcy Code begins, as it must, with the text of the statute. *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986). The plain text of Chapter 13 expressly excludes student loan debt from discharge, thus making it presumptively nondischargeable:

> [A]fter completion by the debtor of all payments under the plan * * * the court shall grant the debtor a discharge of all debts provided for by the plan * * * *except any debt* * * *
>
> > (2) of the kind specified in * * * paragraph * * * (8) * * * of section 523(a).

11 U.S.C. § 1328(a) (emphasis added). Section 523(a)(8), in turn, provides that student loans are nondischargeable "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents." The presumption created by section 1328(a) that student loans are nondischargeable is thus rebuttable only by proof of "undue hardship."

This Court recognized as much in *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004). The issue in *Hood* was whether the Bankruptcy Clause gives Congress the authority to abrogate the States' immunity from private suits. *Id.* at 443. Without reaching that issue, the Court upheld the application of the Bankruptcy Code to adversary proceedings initiated by a debtor against a state guaranty agency to determine the dischargeability of a student loan debt. *Id.* at 451.

In the course of its discussion, the Court explained:

> Student loans used to be presumptively discharged in a general discharge. But in 1976, Congress provided a significant benefit to the States by making it more difficult for debtors to discharge student loan debts guaranteed by States. That benefit is currently governed by § 523(a)(8), which provides that student loan debts guaranteed by governmental units are not included in a general discharge order *unless* excepting the debt from the order would impose an "undue hardship" on the debtor.

541 U.S. at 449 (emphasis added).

Student loan debt is therefore "presumptively nondischargeable," *id.* at 450, as is the interest on that debt. *Bruning* v. *United States*, 376 U.S. 358, 360 (1964) ("[I]nterest is considered to be the cost of the use of the amounts owing a creditor and an incentive

to prompt repayment and, thus, an integral part of the continuing debt."). Absent discharge, the debtor remains personally liable for interest on a nondischargeable debt. *Id.* at 363.

Although a central purpose of the Bankruptcy Code is to provide honest debtors with a "fresh start," *Grogan* v. *Garner*, 498 U.S. 279, 286-87 (1991), "[t]he statutory provisions governing nondischargeability reflect a Congressional decision to exclude from the general policy of discharge certain categories of debt * * * * " *Id.* at 287. "Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start." *Ibid.*

Confronted with evidence of increasing abuse of the bankruptcy process that threatened the viability of educational loan programs (as well as harm to the public fisc), Congress acted to make student loan debt presumptively nondischargeable. *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, pt. I at 11, 170, 176-77; pt. II § 4-506(8) & note (1973). As most student loans are guaranteed or insured by the federal government, their improper discharge harms the public interest because unpaid government-guaranteed student loans must ultimately be paid by taxpayers. The proposed 2010 federal budget projects that guaranteed loan

discharge will cost taxpayers more than $1.5 billion during fiscal 2009.[3]

In making student loan debt expressly and presumptively nondischargeable under sections 523 and 1328, Congress sought to accomplish two important purposes: (1) "preventing abuses of the educational loan system by restricting the ability to discharge a student loan shortly after a student's graduation," and (2) "safeguarding the financial integrity of governmental entities and nonprofit institutions that participate in educational loan programs." 4 COLLIER's ¶ 523.14[1], p. 523-101.

B. Congress Has Repeatedly Amended the Bankruptcy Code To Restrict the Dischargeability of Student Loan Debt.

Federally sponsored student loans began with the National Defense Act of 1958, Pub. L. No. 85-864, Title II, §§ 201-09 (1958), which established the Perkins Loan program. The Stafford Loan program, now known as the FFEL Program, was created by the Higher Education Act of 1965, Pub. L. No. 89-329 (1965) codified at 20 U.S.C. §§ 1071 – 1087-4. At their inception, government-backed student loans

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[3] Table, "Selected Program Costs and Offsets," Office of Federal Student Aid, U.S. Department of Education, Budget of U.S. Government for Fiscal 2010, p. 388 (available from http://www.whitehouse.gov/omb/budget/fy2010/assets/edu.pdf).

were fully dischargeable in bankruptcy. *Hood*, 541 U.S. at 449. Thus, graduating students could discharge their unsecured student loans in bankruptcy while enjoying the higher earning power made possible by their education – and the loans used to attain it. Bankruptcy abuse, in effect, converted many student loans into scholarships.

Student loan bankruptcy abuse raised considerable concern in Congress, see, e.g., H.R. Doc. No. 93-137, pts. I & II (1973), reprinted in B. App. COLLIER'S, pt. 4(c), p. 4-432, and over time, Congress has repeatedly amended the Bankruptcy Code so that student loan debt is no longer readily dischargeable in bankruptcy, but is now presumptively nondischargeable.

Congress first acted to curtail abusive discharges of student loans in bankruptcy in 1976. Educational Amendments of 1976, Pub. L. No. 94-482, § 439A(a) (1976) (codified at 20 U.S.C. § 1087-3 (1976 ed.), repealed by Pub. L. No. 95-598, § 317 (1978)). That enactment made federally insured or guaranteed loans nondischargeable in bankruptcy for a period of five years after the loan first became due, unless payment from future earnings would impose an undue hardship on the debtor.

Ever since, Congress has made it progressively more difficult to discharge student loans. When the current Bankruptcy Code was adopted in 1978, section 523(a)(8) continued the prohibition on discharge within the first five years of the repayment period

absent undue hardship, but expanded the previous statute's scope – which had been limited to federally insured or guaranteed loans – to include any debt "to a government unit, or a nonprofit institution of higher education, for an educational loan." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (1978).

In the years that followed, amendments to section 523(a)(8) have reflected a clear congressional design to limit the dischargeability of student loans. In 1979, Congress again expanded the types of loans protected from discharge and also eliminated certain reasons for deferring payment. Pub. L. No. 96-56, § 3 (1979). In 1984, Congress deleted the words "of higher education" from the statute so as to extend protection against discharge to any nonprofit institution, not just nonprofit institutions "of higher education." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a)(2) (1984).

In 1990, more restrictions on discharge were added. The five-year waiting period was extended to seven years. Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, § 3621(2) (1990). And the exception to discharge of student loans was applied for the first time to Chapter 13 cases by incorporating section 523(a)(8) into section 1328(a). Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007 (1990).

In 1998, Congress amended section 523(a)(8) to eliminate the right to discharge student loans based

solely on their age. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a) (1998). That amendment left undue hardship as the exclusive basis for discharging a student loan. Most recently, Congress acted in 2005 to include student loans funded by for-profit entities among those that are nondischargeable in bankruptcy. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220 (2005).

Over the last 30 years, then, Congress has acted again and again to restrict the ability of debtors to discharge student loan debt. The Bankruptcy Code now allows discharge of student loan debt for one reason, and one reason only – that "excepting such debt from discharge * * * would impose an undue hardship on the debtor." 11 U.S.C. § 523(a)(8).

C. Discharge by Declaration Nullifies the Statutory Presumption That the Exception to Discharge of Student Loan Debts Is Self-Executing.

This Court has recognized that section 523(a)(8)'s exception of student loans from discharge in bankruptcy is "self-executing." *Hood*, 541 U.S. at 450 (citing S. Rep. No. 95-989, p. 79 (1978)). Indeed, the Senate Report cited by the Court explicitly observes,

> Paragraph (8) * * * is *intended to be self-executing* and the lender or institution is *not required to file a complaint* to determine the nondischargeability of any student loan.

(Emphasis added.)

Consequently, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order *will not* include a student loan debt." *Hood*, 541 U.S. at 450 (emphasis added).

Allowing student loan debt to be discharged by mere declaration – without proof of undue hardship through an adversary proceeding – thwarts Congress's intent that the nondischargeability of student loan debts be self-executing. That is true no matter how the declaration is worded. The tactic of discharge by declaration has been deployed by debtors using various formulations. Some debtors have given lip service to the requirement of undue hardship by simply asserting that it exists or deeming it found upon confirmation of the plan. See, e.g., *Andersen* v. *UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253, 1254 (10th Cir. 1999), *overruled by Educational Credit Mgmt. Corp.* v. *Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007). Other debtors have proposed plans paying a specified or pro rata amount and discharging the balance without any mention of undue hardship. See, e.g., *In re Hanson*, 397 F.3d 482, 485 (7th Cir. 2005).

Espinosa took the latter tack, proposing payment of a specific amount. His plan declaration was two-pronged. He declared that certain amounts claimed were "not provided for in the loan agreement," and that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." His plan made no mention of undue hardship. J.A. 26.

Whatever words are used, mere declaration is no substitute for the proof of undue hardship that Congress requires on the face of the statute. As the Tenth Circuit put it, "[s]imply embedding a 'meaningless incantation of undue hardship' in a confirmation plan falls short of the 'affirmative' action required by Congress and the Supreme Court." *In re Mersmann*, 505 F.3d at 1048 (citing *In re Hanson*, 397 F.3d at 486).

In sum, giving effect to a discharge by declaration in a plan negates the self-executing nature of the exception to discharge of student loans enacted by Congress. Creditors would be stripped of the protection of the automatic exception, and the burden of raising the issue of dischargeability would be shifted from the debtor to the creditor – running directly contrary to the express will of Congress.

II. A DEBTOR'S FAILURE TO PROVE UNDUE HARDSHIP IN AN ADVERSARY PROCEEDING NULLIFIES THE PLAN CONFIRMATION AND DISCHARGE OF THE DEBT.

The Court has recognized that "[t]he current Bankruptcy Rules *require* the debtor to file an 'adversary proceeding' * * * in order to discharge his student loan debt." *Hood*, 541 U.S. at 451 (emphasis added). "Adversary proceedings are separate lawsuits within the context of a particular bankruptcy case * * * * " 10 COLLIER'S ¶ 7001.01, p. 7001-3. Federal

Bankruptcy Rule of Procedure 7001 lists ten separate categories of proceedings denominated as adversary proceedings, including "a proceeding to determine the dischargeability of a debt." Thus, proof of undue hardship must be made in an adversary proceeding. *Hood*, 541 U.S. at 449-51.

The burden of proving undue hardship rests on the debtor. E.g., *Rifino* v. *United States* (*In re Rifino*), 245 F.3d 1083, 1087-88 (9th Cir. 2001). To determine if excepting student loan debt from discharge will impose an undue hardship, most circuits apply the three-part test first enunciated in *In re Brunner*, 831 F.2d 395, 396 (2d Cir. 1987), and adopted by the Ninth Circuit in *United Student Aid Funds, Inc.* v. *Pena* (*In re Pena*), 155 F.3d 1108, 1112 (9th Cir. 1998). 4 COLLIER'S ¶ 523.14[2], p. 523-102 n.4.[4]

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[4] Under the *Brunner* test, the debtor must prove that (1) he cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if required to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor has made good faith efforts to repay the loan. Thus, the barriers to discharge of student loan debt are high, no doubt explaining why some debtors attempt to discharge student loan debt by declaration. 831 F.2d at 396.

A. By Express Statutory Restriction, Only Plans That Comply with the Bankruptcy Code May Be Approved.

Congress has twice acted to limit the permissible scope of Chapter 13 plans to those that comply with the Bankruptcy Code: First, it has done so by restricting the content of plans, and second, in a belt and suspenders approach, by also restricting the confirmation of plans.

Title 11, section 1322 first specifies the provisions that a plan "shall" include (§ 1322(a)) and then enumerates the additional provisions that a plan "may" include (§ 1322(b)). Nowhere on that comprehensive list is any provision allowing for the discharge of nondischargeable debts.

To be sure, section 1322(b)(11) allows additional provisions, but *only* if they are both (1) "appropriate" and (2) "not inconsistent" with the Bankruptcy Code – neither of which is even arguably satisfied by a declaration of discharge contrary to the plain text of section 523(a)(8).

For that reason, the Third Circuit has held that Congress did not intend for section 1322(b)(11) to permit the use of a Chapter 13 plan provision to avoid an otherwise-mandatory adversary proceeding. *In re McKay*, 732 F.2d 44 (3d Cir. 1984). There, the debtor sought to avoid a lien by simply providing so in his plan – although the procedure required to "determine the validity, priority, or extent of a lien" was, at that

time, an adversary proceeding under then Rule 701. *Id.* at 47-48. The creditor did not object to the plan, and the bankruptcy court approved it. The Third Circuit reversed, holding that the adversary proceeding requirement was not overridden by the more general provision of what was then section 1322(b)(10) and is now section 1322(b)(11):[5]

> Congress did not intend in section 1322(b)(10) to give the bankruptcy court carte blanche to establish procedures it deems fair without regard to other provisions of the Code. Although it is true that [former] section 405(d) of the Bankruptcy Code does permit its general directive to be overridden by specific laws to the contrary, we do not believe that a substantive catch-all provision such as section 1322(b)(10) contains the requisite specificity or force to suggest that Congress intended it to override the procedural rules adopted by section 405(d).

732 F.2d at 48 (footnote omitted); accord *In re Mansaray-Ruffin*, 530 F.3d 230, 236 (3d Cir. 2008) (noting that section 1322(b)(11) "does not leave courts free to disregard the Rules" requiring an adversary proceeding). That conclusion was compelled by basic principles of statutory construction, to wit, that a statute should be construed so that effect is given to all its provisions, and so that no part will be rendered

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[5] Redesignated by Pub. L. No. 109-8 (2005).

inoperative, superfluous, void, or insignificant. E.g., *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009).

But Congress did not simply limit the content of plans in section 1322. In an abundance of caution, Congress also constrained the confirmation of plans. Thus, the very first requirement for a bankruptcy court to be able to confirm a plan is that the plan must "compl[y] with the provisions of this chapter and with the other applicable provisions of this title." 11 U.S.C. § 1325(a).

This Court has long recognized that the conditions listed in § 1325(a) are mandatory. "To qualify for confirmation under Chapter 13, the [debtors'] plan had to satisfy the requirements set forth in § 1325(a) of the Code." *Associates Commercial Corp.* v. *Rash*, 520 U.S. 953, 956 (1997). "A bankruptcy court is authorized to confirm a plan *only* if the court finds [that the conditions of § 1325(a) have been met]." *Johnson* v. *Home State Bank*, 501 U.S. 78, 87-88 (1991) (emphasis added). Were it otherwise, "a bankruptcy court would have the discretion to confirm a plan even if it were proposed in bad faith or by illegal means." *Wachovia Dealer Services* v. *Jones* (*In re Jones*), 530 F.3d 1284, 1290 (10th Cir. 2008). That is not the law.

The rule of statutory construction that statutes should be construed to be in harmony with each other, *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994), also points to the conclusion that the conditions to plan content and confirmation

are mandatory. As the Tenth Circuit has observed, a reading of the statute that "fails to recognize the mandatory nature of § 1325(a) would be in conflict with § 1329, the section governing modification of a plan after confirmation." *In re Jones*, 530 F.3d at 1290. To hold that the conditions set forth in § 1325(a) are not requirements for confirmation would "clearly 'violate[ ] the general maxim that the Bankruptcy Code and Rules be construed so that their provisions are harmonious with each other.'" *Ibid.* (citation omitted).

A plan proposing to discharge a debt that is automatically excepted from discharge does not comply with the Code. Therefore, such a plan does not satisfy the first condition of § 1325(a) and cannot be confirmed, just as a plan that proposes to pay a claim that is not allowable under the Code cannot be confirmed. See, e.g., *In re Robinson*, 225 B.R. 228, 234 (Bankr. N.D. Okla. 1998) ("A plan which proposes to pay a disallowed claim does not comply with the operative provisions of the Bankruptcy Code and may not be confirmed.").

Thus, by statute, the bankruptcy court has an "independent duty to confirm only those Chapter 13 plans which comply with all the provisions of Chapter 13 (see 11 U.S.C. § 1325(a)(1))." *In re Fizer*, 1 B.R. 400 (Bankr. S.D. Ohio 1979). The Ninth Circuit's remarkable conclusion that bankruptcy courts "have no business standing in the way" (Pet. App. 26) of illegal plan provisions is thus contrary to the text, purpose, and structure of the Code.

B. Orders That Purport To Discharge Student Loan Debt Without a Finding of Undue Hardship in an Adversary Proceeding Are Void to the Extent of Noncompliance.

It has long been established that a judgment is void for purposes of Rule 60(b)(4) if the court, although having jurisdiction over the parties and the subject matter, enters a decree "not within the powers granted to it by the law." *United States ex rel. Wilson* v. *Walker*, 109 U.S. 258, 266 (1883). "If [courts] act beyond [their] authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal." *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353-54 (1920) (citations omitted); *Wilcox* v. *Jackson*, 38 U.S. 498, 511 (1839).

Because bankruptcy courts are prohibited by section 523(a)(8) from discharging a student loan without first determining the existence of undue hardship, and by section 1325(a)(1) from confirming any plan that does not comply with the Bankruptcy Code, they are without authority to confirm a plan for discharge of a student loan and order a discharge without any adjudication of undue hardship. The confirmation order and the subsequent discharge order are thus void to that extent.

Every court of appeals that has considered the issue has reached that conclusion, except for the

Ninth Circuit. *In re Mersmann*, 505 F.3d at 1049 ("[A] bankruptcy court lacks authority to confirm a plan provision that seeks to discharge a student loan debt without an adversary proceeding proving 'undue hardship.'"); *Whelton* v. *Educational Credit Mgmt. Corp.*, 432 F.3d 150, 154 (2d Cir. 2005) ("A discharge obtained in this manner, *i.e.*, 'without filing an adversary proceeding to establish undue hardship,' is plainly 'contrary to the express language of the Bankruptcy Code and Rules.' Thus, it is properly treated as 'void.'") (quoting *In re Hanson*, 397 F.3d at 482 (internal citations omitted)); *In re Hanson*, 397 F.3d at 487 ("Due to the lack of compliance with the Bankruptcy Code and Rules, the bankruptcy discharge order was void and [the creditor] was properly granted relief pursuant to Rule 60(b)(4)."); *In re Escobedo*, 28 F.3d 34, 35 (7th Cir. 1994) (holding that a plan that did not comply with requirements of § 1322(a)(2) was "invalid" and the order confirming it was "nugatory").[6]

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[6] In an analogous context, the failure to adjudicate a predicate issue as required by statute was held to render the resulting order void. In *Great American Trading Corp.* v. *I.C.P. Cocoa, Inc.*, 629 F.2d 1282 (7th Cir. 1980), the threshold issue before the district court was whether the parties had agreed to arbitrate their contract dispute. When the making of an agreement to arbitrate is in issue, the Federal Arbitration Act requires the district court to proceed summarily to trial on that issue. Without doing so, the district court ordered arbitration. After judgment confirming the arbitration award was entered, defendant moved for relief under Rule 60(b) on the ground that the judgment was void because its due process right to a trial on the

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Here, the bankruptcy court failed to adjudicate the statutory requirement of undue hardship. Therefore, the confirmation and discharge orders are void to the extent that they purport to discharge Espinosa's student loans.

C. Failure To Object To a Plan Does Not Nullify the Self-Executing Nature of Exceptions from Discharge.

Because the exception of student loans from discharge in bankruptcy is "self-executing" – that is, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order *will not* include a student loan debt," *Hood*, 541 U.S. at 450 (emphasis added) – a creditor has no duty to object to an illegal plan provision declaring a discharge of the non-dischargeable debt. Instead, the creditor is entitled to wait for the debtor to initiate the adversary proceeding required by the Bankruptcy Rules to secure an undue hardship determination as required by the Bankruptcy Code.

As discussed *supra* at pp. 27-30, compliance with the Bankruptcy Code is a mandatory condition to confirmation of a plan, and any attempt to discharge

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existence of an arbitration agreement had been denied. The district court denied the motion and the court of appeals reversed, concluding that "if no arbitration agreement exists the arbitration award and judgment entered thereon is void and [defendant's] motion for relief from that judgment should have been granted." 629 F.2d at 1288.

a student loan without a finding of undue hardship does not comply with section 523(a)(8). Therefore, the court cannot confirm such a noncompliant plan even if no creditor objects to it. Absent a duty to object, the failure to object cannot constitute a waiver of the express requirements of the Bankruptcy Code and Rules. The Third Circuit reached that conclusion in the context of a Chapter 13 debtor's attempt to invalidate a lien through a plan provision without initiating an adversary proceeding as required by Rule 7001(2). *In re Mansaray-Ruffin*, 530 F.3d at 237-38 (holding that creditor's "failure to object" to plan "did not do away with [the debtor's] duty to file a complaint and serve [the creditor] pursuant to Rules 7001, 7003, and 7004" and stating that the creditor "had the legal right to do nothing and insist upon being served with a summons and a complaint in order for its lien to be invalidated").

The Ninth Circuit's conclusion to the contrary rests on faulty assumptions about what creditors can glean from the debtors' filings for purposes of lodging an objection to a plan based upon the lack of undue hardship. See Pet. App. 9-10. Even assuming that the schedules to the debtor's petition demonstrate the first element of undue hardship – that "he cannot maintain, based on current income and expenses, a 'minimal' standard of living for himself and his dependents if required to repay the loans" – they do not evidence the second element, that "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period." See n.4, *supra*. Similarly, the

limited information in a debtor's schedules is insufficient to enable the creditor to evaluate the third element – whether the debtor has made good faith efforts to repay the loans. Thus, a creditor would have no basis to "believe that the debtor would be able to make a convincing showing of undue hardship, and thus see no point in wasting the debtor's money, and its own, litigating the issue," or to "decide that a Chapter 13 plan presents the best chance of collecting most of the debt, rather than spending years trying to squeeze blood out of a turnip." See Pet. App. 9. The court of appeals' speculation excludes the more likely possibility, and the creditor's hope, that the debtor's education will produce greater earnings and thus an improved ability to pay in the future, especially when coupled with the debtor's forthcoming "fresh start."

The Ninth Circuit's supposition that a creditor would choose not to object to an invalid plan and instead "hope that the debtor will make some payments on the plan but ultimately fail to complete it, in which case the creditor will have collected a portion of the debt and still be free to collect the rest later," Pet. App. 9-10, is badly mistaken. There is no reason for a creditor to go along with a plan that proposes only partial payment of a student loan debt and discharge of the balance because the loan is nondischargeable and the student loan creditor has collection methods unavailable to most other creditors (for example, administrative wage garnishments, 20 U.S.C. § 1095a, interception of income tax refunds,

31 U.S.C. § 3720A, and offset of federal government benefits, 31 U.S.C. § 3716). Furthermore, there is no statute of limitations for the collection of student loans. 20 U.S.C. § 1091a.

There is no basis to assume that placing the burden on student loan creditors to object to plans, rather than (as the statute does) on debtors to prove undue hardship, would further any productive purpose. Indeed, forcing student loan creditors to spend time and money poring over plans that by law cannot properly effect a discharge of student loans makes little sense – particularly given that no one is better positioned than debtors themselves to know whether repayment would work an "undue hardship" on them.

D. Confirmation and Discharge Orders Entered with No Determination of Undue Hardship are Not *Res Judicata* as to the Student Loan Creditor.

Although *res judicata* bars a collateral attack on a final judgment, it does not bar a direct attack on a void judgment. *Pepper* v. *Litton*, 308 U.S. 295, 302 (1939); see also 18 MOORE'S FEDERAL PRACTICE § 131.02[1][a]. A Rule 60(b)(4) motion, such as the one made by USA Funds here, is a "direct attack" for *res judicata* purposes. *Ibid.* Furthermore, "there is no time limit on an attack on a judgment as void * * * * A void judgment cannot acquire validity because of laches." 11 CHARLES ALAN WRIGHT, ET AL., FEDERAL

PRACTICE AND PROCEDURE § 2862 (2d ed. 1995). Under those longstanding principles, confirmed plans and orders that propose to discharge student loan debt cannot be *res judicata* without a finding of undue hardship as the statute mandates.

1. The elements of *res judicata* are not satisfied.

For *res judicata* to apply, (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the party must have had a full and fair opportunity to litigate the claim in the prior suit. *Montana* v. *United States*, 440 U.S. 147, 153 (1979). At least two of those requirements are not fulfilled when a Chapter 13 plan proposes to discharge a student loan debt by mere declaration.

First, discharge of student loan debt without a determination of undue hardship is not an adjudication on the merits – which this Court has called the "most essential element of *res judicata*." *Cumberland Glass Mfg. Co.* v. *DeWitt*, 237 U.S. 447, 458 (1915). The exception to discharge of student loan debt is self-executing, and a debtor who wishes to defeat the statutory presumption against discharge must commence an adversary proceeding and secure a judicial determination of undue hardship. *Hood*, 541 U.S. at 449-51. It necessarily follows that a discharge

obtained by confirmation of a plan merely declaring a discharge is not an adjudication on the merits.

For nearly two decades, courts have recognized that "confirmation of a Chapter 13 plan is *res judicata* only as to issues that can be raised in the less formal procedure for contested matters." *Cen-Pen Corp.* v. *Hanson*, 58 F.3d 89, 93 (4th Cir. 1995) (citing *In re Beard*, 112 B.R. 951, 955-56 (Bankr. N.D. Ind. 1990)). "In other words, '[i]f an issue must be raised through an adversary proceeding it is not part of the confirmation process and, unless it is actually litigated, confirmation will not have a preclusive effect * * * * *'" *Ibid.* (quoting *In re Beard*, 112 B.R. at 956); *In re Mersmann*, 505 F.3d at 1050 ("[I]f an issue must be raised through an adversary proceeding it will not have a preclusive effect unless it is actually litigated."); *Whelton*, 432 F.3d at 154 (same); *In re Enewally*, 368 F.3d 1165, 1173 (9th Cir. 2004) ("Although confirmed plans are *res judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor."); *In re Escobedo*, 28 F.3d at 35 ("The [p]lan was invalid for failing to include the mandatory provisions of § 1322(a)(2), and has no *res judicata* effect.").

Second, discharge by declaration does not provide a full and fair opportunity to litigate the issue of undue hardship on the merits – a key element of *res judicata*. *Montana* v. *United States*, *supra*. Whether a party received adequate notice is crucial to whether

that party had a full and fair opportunity to litigate the claim for *res judicata* purposes. Although a bankruptcy court confirmation order is usually *res judicata*, it is not entitled to such deference unless it was preceded by adequate notice. See, e.g., *Piedmont Trust Bank* v. *Linkous* (*In re Linkous*), 990 F.2d 160, 162 (4th Cir. 1993) ("[W]e cannot accord the bankruptcy court's order the finality which would attach if the notice given to [the creditor] was adequate.").

In this case, there is a marked difference between the level of notice provided to creditors in the adversary proceeding required by the Bankruptcy Rules, and that provided if a debtor is permitted to substitute discharge by declaration for the adversary proceeding. With the latter, the level of notice is much lower than that required for an adversary proceeding. Notice of a plan (in no particular format) need only be sent by mail to creditors at the addresses provided by the debtor on his or her list of creditors. FED. R. BANKR. P. 2002(g)(2). In contrast, adversary proceedings come to the lender's door by service of a summons and complaint. FED. R. BANKR. P. 7003, 7004. Because student loan guarantors like USA Funds receive "tidal waves of mail," *Ruehle* v. *Educational Credit Mgmt. Corp.* (*In re Ruehle*), 412 F.3d 679, 684 (6th Cir. 2005), using a plan as a vehicle to communicate an attempt to discharge a nondischargeable debt is not "reasonably calculated" to give adequate notice. As the Sixth Circuit has observed:

> The quantity of "notice" that is issued by the bankruptcy system is so overwhelming that

> it is necessary to have clear rules in order for creditors to know what notices to notice as opposed to the notices that are deafening legal background noise. The Code and the Rules set forth those clear standards and it is up to the courts to ensure that the lines are not blurred.

In re Ruehle, 412 F.3d at 684. Because the "clear standards" established by the Bankruptcy Rules to ensure that notice is adequate for adversary proceedings are not satisfied where discharge by declaration is substituted by the debtor, plan confirmation and discharge orders entered under those circumstances are not *res judicata*.

2. The Bankruptcy Code's general finality provision does not apply to plan provisions that are contrary to law.

Although generally "[t]he provisions of a confirmed plan bind the debtor and each creditor, * * * whether or not such creditor has objected to * * * the plan," 11 U.S.C. § 1327(a), a confirmation order does not have that effect when the plan does not comply with other provisions of the Bankruptcy Code or a creditor is denied due process. The confirmation and discharge orders here, obtained as they were without proof of undue hardship in an adversary proceeding and without proper notice to USA Funds, do not have preclusive effect. See, e.g., *In re Ruehle*, 412 F.3d at 684 (rejecting the argument that such orders have

preclusive effect because doing "it ignores the clear intent of Congress and the Judicial Conference" to require proof of undue hardship through an adversary proceeding); *In re Mersmann*, 505 F.3d at 1047 ("Discharge-by-declaration deserves no preclusive effect under § 1327(a) because it fails to comport with the provisions of the Bankruptcy Code and Rules governing discharge."); *Whelton*, 432 F.3d at 154 (same); see also *In re Mansaray-Ruffin*, 530 F.3d at 238-39 (plan confirmation order was not final where adversary proceeding was mandatory to invalidate lien).

Any other conclusion would put two statutes in needless conflict and render one of them partially ineffective – thereby violating the familiar canons of construction that where general and specific statutes seemingly conflict, the specific provision governs the general, see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), and that statutes should be interpreted where possible to give meaning to all their terms. *Corley*, 129 S. Ct. at 1566. Specifically, applying section 1327(a) to give finality to a confirmation order that includes an invalid discharge by declaration conflicts with section 1328(a), which provides for discharge of all debts upon completion of the debtor's plan, except, *inter alia*, student loans. Thus, "[g]iving preclusive effect to a discharge-by-declaration through § 1327(a) renders part of § 1328(a)(2) nugatory." *In re Mersmann*, 505 F.3d at 1048. Because discharge by declaration violates the plain text of the Bankruptcy Code, the statutes should be harmonized by allowing section 1328(a)'s

specific exception to discharge to limit section 1327(a)'s general effect.[7] *Ibid.*

Nor can an order bar a challenge to the discharge of student loan debt where, as here, the order specifically excepts the debt from discharge. J.A. 46. Although the bankruptcy court, on remand, ruled that the exclusion of USA Funds' student loan debt from the discharge order was a clerical error, the materially amended discharge order does not relate back to operate retroactively. *Federal Trade Comm'n* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952). For that reason, too, USA Funds' challenge to the discharge of Espinosa's student loan debt is not barred.

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[7] The finality of plan confirmation and discharge orders is not otherwise at issue where nondischargeable debts are involved. If an order purporting to discharge a nondischargeable debt is void as to that debt, there is no material consequence. The nondischargeable debt simply remains undischarged, leaving other creditors unaffected.

III. THERE ARE SOUND POLICY REASONS WHY CONGRESS REQUIRED AN ADVERSARY PROCEEDING TO ESTABLISH UNDUE HARDSHIP BEFORE STUDENT LOAN DEBT MAY BE DISCHARGED.

A. If the Ninth Circuit's Approach Were Adopted Nationwide, It Would Apply to All Statutory Exceptions to Discharge.

In addition to student loan debt, Congress has expressly excepted a litany of other debts from discharge in Chapter 13 bankruptcy cases: certain taxes and customs duties; debts incurred through falsity or fraud; debts not listed or scheduled in time to permit timely filing of a claim; debts arising from embezzlement or larceny; debts for death or personal injury caused willfully or maliciously or while operating a motor vehicle, vessel or aircraft while intoxicated by alcohol or drugs; domestic support obligations such as alimony and child support; and restitution and fines when included in a debtor's criminal sentence. Those exceptions to discharge are enumerated in multiple subparagraphs of section 523(a) and incorporated into section 1328(a) as well.[8]

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[8] Most of the exceptions to discharge in Chapter 13 cases are, like the student loan exception, self-executing. Not automatically excepted from discharge are, in general terms, debts for fraud, defalcation while acting as a fiduciary, embezzlement, and larceny as specified in § 523(a)(2) and (4). Section 1328(a) incorporates those categories of debt from § 523(a), and they are

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In approving discharge by declaration, the Ninth Circuit relied upon the following syllogism: (i) all creditors have an affirmative obligation to object to provisions of a plan that purport to discharge nondischargeable debts; (ii) if a creditor does not object, the bankruptcy court must confirm the plan; and (iii) once the plan is confirmed, it is binding in perpetuity, and all nondischargeable debts therein are deemed discharged, notwithstanding the plain text of the statute to the contrary. As demonstrated above, *supra*, pp. 23-42, each proposition of the court of appeals' syllogism is false and contrary to law.

But, even if the Ninth Circuit were correct in its reasoning, there is *not a word in its analysis that limits the logic to student loans*. By its terms, if any plan that purports to discharge a nondischargeable debt must be enforced in all subsequent proceedings, then every exception in section 523(a) would likewise be subject to discharge by declaration.

Thus, if approved by this Court, the tactic of discharge by declaration would necessarily spread to every other nondischargeable debt, such as taxes, spousal maintenance, child support, drunk driving personal injury and death judgments, and criminal

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therefore subject to the requirement of § 523(c)(1) that creditors who are owed such debts must initiate an adversary proceeding in the bankruptcy court to establish the nature of the debtor's conduct and seek a determination of dischargeability. If the creditor does not do so, the debt will be discharged. 4 COLLIER'S ¶ 523.26[1], p. 523-133.

fines and restitution. Indeed, if such an avenue were available to circumvent the Bankruptcy Code and Rules, zealous debtors' counsel would routinely include all such nondischargeable debts in every bankruptcy plan.

The Ninth Circuit has previously avoided addressing "the public policy concerns that might impact the dischargeability of such [other] obligations," *In re Pardee*, 193 F.3d at 1087, n.6, but the logic behind its rule does not permit them to be ignored. And there are compelling reasons not to allow discharge by declaration for the nondischargeable debts Congress enumerated in section 523(a).

In contrast to student loan cases, where the Ninth Circuit asserted that "[a]fter all, we aren't talking here about destitute widows and orphans, or people who don't speak English or can't afford a lawyer," Pet. App. 16-17, exactly such individuals will necessarily be affected if discharge by declaration is allowed to spread to the debts owed to them.

None of the assumptions made by the court of appeals in this case about the sophistication of student loan lenders and guarantors can be made about divorced spouses who are owed family support, or those injured by or surviving those killed by a drunk driver, or the victims of crimes, all of whom stand to lose what they are owed through an illegal discharge in bankruptcy. Such individuals, to borrow the court of appeals' phrases, are not creditors "whose business it is to administer [such debts]," Pet.

App. 26, or "sophisticated parties who have ample resources to protect their rights." Pet. App. 17. Therefore, "leaving it up to the creditor and his lawyers to figure out what objections or remedies are available," as the court of appeals would have it when a debtor proposes an over-reaching Chapter 13 plan, cannot be what Congress had in mind.

Even sophisticated creditors – such as government entities who are owed taxes, customs duties, criminal fines, and the like – should not be saddled with the additional burden of having to scrutinize every Chapter 13 plan they receive in search of discharge provisions that do not belong there. That is particularly so because debtors are best positioned to prove undue hardship. Given that, it is hardly unfair that debtors should bear the burden of giving proper notice in the manner required by law. And, of course, if a change in the law or procedural rules is warranted, it should be made by Congress or the Judicial Conference – not by judicial decisions effectively amending the Bankruptcy Code and Rules to allow discharge by declaration.

Promoting the expansion of discharge by declaration cannot be reconciled with the reasons Congress made certain debts nondischargeable in the first instance. For example, making it possible to discharge domestic support obligations would be inconsistent with the legislative goals of protecting spouses and children, and the public fisc from an increased welfare burden. *In re Sargis*, 197 B.R. 681, 687

(Bankr. D. Colo. 1996); *Matter of Bell*, 189 B.R. 543, 547 (Bankr. N.D. Ga. 1995); *In re Bishop*, 13 B.R. 304, 305 (Bankr. E.D.N.Y. 1981). Enabling the discharge of taxes would be contrary to maintaining government financing and preventing tax evasion. *Bruning* v. *United States*, 376 U.S. at 361. Permitting the discharge of criminal fines and restitution would offend the intention that discharge in bankruptcy not be a haven for wrongdoers. *Richmond* v. *New Hampshire Supreme Court Comm. on Prof'l Conduct*, 542 F.3d 913, 917 (1st Cir. 2008). Allowing the discharge of drunk driving tort debts would hardly deter drunk driving or protect the victims of drunk drivers. *In re Hudson*, 859 F.2d 1418, 1423 (9th Cir. 1988).

With respect to student loan debt, Congress has made the judgment that, absent undue hardship, creditors' interests in recovering full payment of student loan debts outweighs the debtors' interest in a completely fresh start. Discharge by declaration thwarts that judgment and reverses decades of legislative amendments all designed to make it more difficult – not easier – for student loan debt to be discharged in bankruptcy. And it does so without any significant, much less compelling, countervailing policy considerations.

B. Requiring Creditors To Raise *Pro Forma* Objections To Preserve the Statutory Exceptions Would Yield No Meaningful Benefits While Imposing Significant Dead-Weight Losses.

As a practical matter, shifting the burden of pleading to the creditor is not only contrary to the Bankruptcy Code and Rules, but senseless and wasteful of the parties', and especially the courts', limited resources.

USA Funds does not maintain that it would be impossible to object to every attempted discharge by declaration. With enough money, and hiring an armada of lawyers, that would surely be possible – for student loan providers and for many other creditors with nondischargeable debts under section 523(a). But it would be a waste of resources for all concerned, and would accomplish no meaningful benefit whatsoever.

Federal student loan programs involve more than 6,200 postsecondary institutions, 3,100 lenders, 35 guaranty agencies, and numerous third-party servicers. U.S. DEPT. OF EDUCATION, FINANCIAL AND PERFORMANCE QUARTERLY UPDATE, Issue 2008-2, at 7 (Sept. 30, 2008). During fiscal year 2008 alone, Federal Student Aid provided $96 billion in student loan awards and oversaw an outstanding loan portfolio of more than $500 billion. *Ibid.* In 2007-2008, students and their parents borrowed $86.7

billion in federal and private education loans,[9] and 54 percent of all full-time college students acquired student loans.[10]

At the same time, unfortunately, consumer bankruptcy filings are now on the rise, increasing by 31 percent in 2008 alone. ADMIN. OFFICE OF THE U.S. COURTS News Release, BANKRUPTCY FILINGS UP IN CALENDAR YEAR 2008 (Mar. 5, 2009).[11] Chapter 13 bankruptcy filings have increased substantially every year since 2006. *Ibid.* (citing statistics of 251,179 Chapter 13 filings in 2006, 324,771 in 2007, and 362,762 in 2008).

Although the precise number of Chapter 13 bankruptcies involving student loans is unknown, the potential is enormous given the ubiquity of student loans and the volume of Chapter 13 bankruptcies. Adopting the Ninth Circuit's rule would require student loan guarantors (like USA Funds), the Department of Education, and lenders to object in virtually every case.

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[9] TRENDS IN STUDENT AID 2008, COLLEGE BOARD, October 2008, http://professionals.collegeboard.com/profdownload/trends-in-student-aid-2008.pdf.

[10] HOW MUCH ARE COLLEGE STUDENTS BORROWING, COLLEGE BOARD POLICY BRIEF, August 2009, http:/professionals.collegeboard.com/profdownload/cb-policy-brief-college-stu-borrowing-Aug-2009.pdf.

[11] Available at www.uscourts.gov/Press_Releases/2009/BankruptcyFilingsDec2008.cfm.

The effect of the court of appeals' rule is to force such objections as a matter of course: "[i]f a debtor proposes to discharge a student loan debt without invoking the special procedures applicable to such debts, the creditor can object to the plan until the debtor shows undue hardship in an adversary proceeding." Pet. App. 9, 10, 14-15, 24 n.6. But, the court also acknowledged, once made, any such objection must necessarily be sustained: "Had [USA] Funds so objected, the bankruptcy court would have been *required* to disapprove the plan." *Id.* at 15 (emphasis added).

Given that every single objection to every plan that includes a discharge by declaration must be sustained, the predictable outcome of the Ninth Circuit's rule – if extended nationwide – would be (1) that debtors' counsel would routinely attempt to include nondischargeable debts in proposed plans, and (2) creditors currently protected by sections 523(a) and 1328(a) would be forced to hire the lawyers and expend the resources to scrutinize every such plan and to interpose objections to every attempted discharge by declaration. And when every objection was upheld, we would return to the *status quo ante* – that the only way to discharge student loan debts would be for the debtor to initiate an adversary proceeding and meet his or her burden of proof.

That makes no sense. It would mandate an enormous expenditure of resources – which, in the student loan context would necessarily either drive up costs to

student borrowers and to the taxpayers or reduce available loan funds – and an even bigger waste of time for the court system, all to accomplish nothing.

All of these dead-weight losses can be avoided, and the identical outcome can be achieved, simply by giving effect to the plain text of the Bankruptcy Code and Rules.

IV. DUE PROCESS REQUIRES THE HEIGHTENED NOTICE AFFORDED STUDENT LOAN CREDITORS IN ADVERSARY PROCEEDINGS.

The Court has recognized that an adversary proceeding to determine the dischargeability of a debt provides greater procedural protection to the creditor through personal notice:

> Creditors generally are not entitled to personal service before a bankruptcy court may discharge a debt. Because student loan debts are not automatically dischargeable, however, the Federal Rules of Bankruptcy Procedure provide creditors greater procedural protection. The current Bankruptcy Rules require the debtor to file an "adversary proceeding" * * * in order to discharge his student loan debt. The proceeding is considered part of the original bankruptcy case * * * * But, as prescribed by the Rules, an "adversary proceeding" requires the service of a summons and complaint.

Hood, 541 U.S. at 451-52 (internal citations omitted). Adversary proceedings are specific to the debtor and

the affected creditor. "The adversary proceeding is treated as a separate dispute between the Debtor and Creditor, subject to the procedural guidelines and safeguards contained in the Federal Rules of Civil Procedure." *Banks* v. *Sallie Mae Servicing Corp.* (*In re Banks*), 299 F.3d 296, 301 (4th Cir. 2002). It is an "individualized determination." *Hood*, 541 U.S. at 450.

The adversary proceeding is prescribed by the Bankruptcy Rules, which in turn are promulgated under 28 U.S.C. § 2075. Such proceedings are modeled on the traditional civil litigation format, either incorporating or adapting most of the Federal Rules of Civil Procedure. FED. R. BANKR. P. 7001, Advisory Committee Notes. Accordingly, an adversary proceeding is commenced by the filing of a complaint. FED. R. BANKR. P. 7003 (incorporating FED. R. CIV. P. 3). The complaint must then be served with a summons. FED. R. BANKR. P. 7004. Service upon a corporation, such as USA Funds, must be made upon "an officer, a managing or general agent, or to any agent authorized by appointment or by law to receive service of process." FED. R. BANKR. P. 7004(b)(3). Thus, an adversary proceeding requires a "heightened degree of notice." *In re Banks*, 299 F.3d at 303, n.4; *In re Hanson*, 397 F.3d at 487 (same).

In contrast, notice of the hearing on confirmation of a Chapter 13 plan need only include a summary of the plan, not the actual plan. FED. R. BANKR. P. Rule 3015(d). And notice need only be sent by mail to creditors at the addresses provided by the debtor on

his or her list of creditors. FED. R. BANKR. P. 2002(g)(2). Notice of a proposed plan thus does not require specific notice of the effect of the plan on each creditor, and it does not require notice to be served on a person at any particular level of responsibility. The notice requirements to initiate an adversary proceeding are thus far more exacting than the notice required for confirmation of a Chapter 13 plan. *Hood*, 541 U.S. at 451-52; *In re Mersmann*, 505 F.3d at 1043; *In re Ruehle*, 412 F.3d at 684-85; *In re Banks*, 299 F.3d at 301.

Espinosa's plan – which made no mention of undue hardship or its requisite elements and thus was not even the "functional equivalent" of a complaint[12] – was merely mailed to USA Funds at the post office box address at which it received loan payments. Although USA Funds received such minimal notice of Espinosa's plan, it was not given the notice and opportunity to be heard that Congress has prescribed to be due.

The Due Process Clauses of the Fifth and Fourteenth Amendments have long been held to require both substantive and procedural due process.

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[12] A complaint in an adversary proceeding must comply with Federal Rule of Civil Procedure 8(a). It must "show[ ] that the [debtor] is entitled to relief" and demand the relief sought. Rule 7008 (incorporating Federal Rule of Civil Procedure 8). A complaint seeking to discharge a student loan must therefore allege facts satisfying the requisite elements of undue hardship and pray for a discharge of the loan.

E.g., *Harrah Ind. Sch. Dist.* v. *Martin*, 440 U.S. 194, 196 (1979). Procedural due process – at issue here – can be further bifurcated, demanding (1) the constitutional minima of process (typically notice and opportunity to be heard) before a deprivation of property, and (2) compliance with whatever process Congress has determined is due in the particular proceeding at issue.

It is this second aspect of procedural due process that is implicated in the case at bar. USA Funds' argument is not predicated on the constitutional minima; USA Funds does not contend that, if Congress chose to allow discharge by declaration, the Constitution would forbid it.

But, Congress has not done so. Instead, the Bankruptcy Code and Rules establish heightened procedural protections for the discharge of student loan debts, and due process requires that those protections be given full force. See generally *City of New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953) (discussed in detail below).

The Court has held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) (citations omitted).

Congress has prescribed in the Bankruptcy Code the level of notice that is due:

> In this title – "after notice and a hearing," or a similar phrase – means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances * * * *

11 U.S.C. § 102(1)(A). That standard applies to plan confirmation hearings by virtue of the language of the confirmation hearing statute, section 1324: "After notice, the court shall hold a hearing on confirmation of the plan." See also 2 COLLIER'S ¶ 102.02[3], p. 102-6 n.14.

"The determination of what is 'appropriate' in the circumstances may be aided by reference to the Federal Rules of Bankruptcy Procedure." 2 COLLIER'S ¶ 102.02[1], p. 102-4. Thus, the appropriate notice in any proceeding to discharge a student loan is that which is required by the Bankruptcy Rules in an adversary proceeding to determine the dischargeability of a debt. *In re Mansaray-Ruffin*, 530 F.3d at 242 ("[D]etermination regarding the process due in any particular case depends on the context. A crucial piece of the context here is the existence of a binding Federal Rule of Bankruptcy Procedure directly on point that makes clear that a lien may only be invalidated through an adversary proceeding.").

If such notice is more than would be required absent section 102(1)(A), the higher statutory

standard must nevertheless be satisfied. See *Hood*, 541 U.S. at 451-52; *Mullane*, 339 U.S. at 314. Espinosa's failure to satisfy the heightened notice standard deprived USA Funds of the notice deemed appropriate by Congress and the Bankruptcy Rules and constitutes a denial of due process that voids the confirmation and discharge orders. "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Id.* at 315.

That USA Funds had knowledge of Espinosa's bankruptcy and received his proposed plan containing the discharge by declaration provision does not alter that conclusion. As this Court has explained, "even creditors who have knowledge of a reorganization have a *right* to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." *City of New York*, 344 U.S. at 297 (emphasis added). In that case, the City had improvement liens on the debtor railroad's real estate. *Id.* at 294. Pursuant to the Bankruptcy Act, the court issued an order giving creditors a deadline to file claims, after which deadline any unfiled claims would be denied participation. *Ibid.* Although the Act provided that "[t]he judge shall require [debtors] to file in the court a list of all known creditors," that was not done. *Id.* at 296. The Act further provided that "[t]he judge shall cause reasonable notice of the period in which claims may be filed, * * * by publication or otherwise." *Ibid.*

The judge required the railroad to give notice by mail to specific creditors and all others who had

appeared in court, and to publish the notice. *Id.* at 294. Although the City's liens were known to the railroad, the City did not receive notice by mail. *Id.* at 294, 296. The City did not file a claim, *id.* at 294, and therefore the court ruled the City's liens were unenforceable, *id.* at 295. This Court rejected the argument that the City's knowledge of the bankruptcy trumped the requirement to give notice as required by law, stating:

> [E]ven creditors who have knowledge of a reorganization *have a right to assume that the statutory "reasonable notice" will be given* them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.
>
> The statutory command for notice embodies a basic principal of justice – that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights * * * *

Id. at 297 (emphasis added).

Similarly, USA Funds was entitled to expect notice by service of a summons and complaint in an adversary proceeding to determine undue hardship. "[W]here an adversary proceeding is required to resolve the disputed rights of the parties, the potential defendant has the right to expect that the proper procedures will be followed." *In re Banks*, 299 F.3d at 302 (citation and internal quotation omitted);

accord *In re Mansaray-Ruffin*, 530 F.3d at 239-40; *In re Mersmann*, 505 F.3d at 1049; *In re Ruehle*, 412 F.3d at 684-85. Anything less is "winking at due process, which is the cornerstone of justice." *Id.* at 684.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

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STATUTES INVOLVED

11 U.S.C. § 102. Rules of construction.

In this title –

(1) "after notice and a hearing", or a similar phrase –

(A) means after such notice as is appropriate in the particular circumstances, and after opportunity for a hearing as is appropriate in the particular circumstances * * *

11 U.S.C. § 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty * * *

* * * *

(5) for a domestic support obligation;

* * * *

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for –

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in

whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

* * * *

11 U.S.C. § 1322. Contents of plan.

(b) Subject to subsections (a) and (c) of this section, the plan may –

* * * *

(11) include any other appropriate provision not inconsistent with this title.

* * * *

11 U.S.C. § 1325. Confirmation of plan.

(a) [T]he court shall approve a plan if –

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

* * * *

11 U.S.C. § 1327. Effect of confirmation.

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. § 1328. Discharge.

(a) As soon as practicable after completion by the debtor of all payments under the plan, * * * the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1322(b)(5);

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

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In The Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

FRANCISCO J. ESPINOSA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a confirmed plan of arrangement in a Chapter 13 bankruptcy case, which a creditor received actual notice of and allowed to become final, is void either because its student loan discharge language did not include a finding of undue hardship or because the actual notice given was that required to give notice of a plan confirmation instead of for an adversary proceeding.

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STATEMENT OF THE CASE

Student loans are non-dischargeable under the Bankruptcy Code unless repayment would cause the debtor undue hardship. Petitioner Francisco Espinosa proposed a Chapter 13 plan under which he would pay all principal on his student loan, but be discharged from interest. Espinosa did not propose that there be a finding of undue hardship, which under Bankruptcy Rule 7001 would occur in an adversary proceeding. United Student Aid Funds, Inc. received actual notice of the plan and filed a proof of claim. United did not object to the plan. The plan was confirmed, and United did not move to alter or amend the order, nor move for relief from it on the ground of mistake, excusable neglect or fraud under Civil Rule 60(b), and it did not appeal. Instead, it ignored the order and collected five years of payments by Espinosa pursuant to the plan. Then it began collecting additional money from Espinosa. Espinosa sought to enforce the finality of the Bankruptcy Court's order.

United defended against Espinosa's action by claiming that the order was void. However, the only grounds upon which it seeks relief are those that could have and should have been asserted by objecting to the order confirming a plan. United seeks a result which would eviscerate the finality accorded plans of arrangement and expand the reach of the due process clause to constitutionalize any procedures found in court rules or congressional statutes. Such an outcome would produce chaos for the finality of litigation in general, and bankruptcy in particular. It would also generate huge numbers of due process cases as the courts tried to determine what rules or statutes bore constitutional significance.

1. Espinosa received four student loans in 1988, totaling $13,250.00, to attend a trade school in Arizona, I.T.T. Technical Institute. JA 16, 26. At that time, Espinosa was working as an airline ramp agent in Phoenix, Arizona. JA 21. Four years later, he still held the same job. *Ibid.* Espinosa was unmarried and lived frugally. He rented an apartment for $370.00 per month. He drove a car valued at $1,200.00 – the proverbial "beater."

In 1992, Espinosa filed a Voluntary Petition for Chapter 13 relief in the Bankruptcy Court for the District of Arizona. JA 5. United was Espinosa's only creditor. JA 16. Espinosa's plan proposed that he pay United $274.00 per month, slightly more than the entire amount of his available disposable income. JA 23. The plan obligated Espinosa to pay for five years, JA 24, the maximum duration of a Chapter 13 plan. 11 U.S.C. 1322(d)(2). The plan proposed to pay United the entire outstanding principal amount of Espinosa's four student loans, totaling $13,250.00. JA 26, 33. After deduction of fees and costs related to his Chapter 13 case, that principal amount would just be covered by all of his payments.

2. Under Bankruptcy Rule 1007, when a petition is filed a debtor must file a "Master Mailing List" of known addresses of all of his creditors and verify to the best of his knowledge that the list is true and correct. Rule 1007. Espinosa did this. ER 57, 58. The mailing list included:

- The post office box address that United had told Espinosa to use in making loan payments;

- The address for the United States Department of Education National Payment Center;

- The address for the Educational Loan Servicing Center;

- The address for General American Credits, a collection agency; and

- The address for the educational institution, ITT Technical Institute. ER 57.

Notice of Espinosa's bankruptcy was mailed to the entities on the mailing list, as required by 11 U.S.C. 341. The notice advised that Espinosa would seek Bankruptcy Court confirmation of his plan on April 15, 1993, more than four months later. Espinosa sent the complete, proposed plan of arrangement along with the notices of filing his petition, of the first meeting of creditors, and of the hearing to confirm the plan.

The Plan prominently featured on it first page, in bold letters, the legend:

> "WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." JA 23.

The plan also spelled out in full detail its proposal that the principal of the education loans held by United, in specific amounts, would be fully paid, and that all other amounts claimed owing by the debtor, of any nature, would be discharged. The fourth page of the plan specified:

"(2) These loans totaling $13,250.00 shall be paid in full as an unsecured claim all as set forth in the Chapter 13 Debt Adjustment Plan attached hereto.

"(3) . . . .

"(4) Any amounts or claims for student loans unpaid by this Plan shall be discharged." JA 26.

The notice was successful and complete. A stamped legend on the Notice demonstrates that the litigation department of United received the notice on December 18, 1992, more than four months before the date of the hearing to confirm a plan. JA 34. United received actual notice of the filing, of the plan and of the hearings from the Clerk of the Bankruptcy Court, as specified by Fed. R. Bankr. P. 2002(b). JA 34. Proof that the actual notice was in fact successful is also confirmed by the fact that United filed a Proof of Claim on January 8, 1993, more than three months before the scheduled hearing to confirm the plan.

United made no objection to its treatment in the Plan. The Bankruptcy Court confirmed the plan on May 6, 1993. United did not appeal that order. But there is more.

On June 10, 1993, within the time for United to appeal, the Trustee served notice of her objection to United's proof of claim upon United, giving United 30 days to respond. E.R. 36. Service was accomplished by mail to the address specified in United's proof of claim. The objection notified United that its claim of $17,832.15 would only be paid in the amount of

$13,250.00. The Trustee's notice provided thirty days to object to this treatment of United's claim. United did not object or appeal.

It's not as though United had no recourse at this point. United could have appealed. It could have moved under Rule 9023 to alter or amend the judgment confirming the plan, to remove the provision discharging student loan charges. It could have filed within one year a motion for relief under Bankruptcy Rule 9024, which incorporates Fed. R. Civ. P. 60(b)(1), (2) or (3), on the grounds of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct. It took none of these steps.

Instead of availing itself of any legal remedies, United collected its proposed amount under the plan, waited for seven years and then began unilaterally intercepting government payments belonging to Espinosa.

3. Espinosa paid all obligations for the five year duration of the plan. In 1997 the Bankruptcy Court issued him a discharge which contained the standard form language excepting student loans from the discharge normally granted a debtor who successfully performs a plan. JA 46. As the Bankruptcy Court later found, use of this boilerplate was an obvious clerical error since the whole purpose of Espinosa's Chapter 13 plan was to pay most of the student loans, but discharge the remainder. JA 48.

United's inaction continued for another two years, after which the Department of Education began to intercept Espinosa's income tax refunds, and United began to dun Espinosa for payment of some

$17,000.00. Espinosa's counsel twice wrote to the United States Department of Education and to United's Arizona counsel, explaining in detail that Espinosa's Chapter 13 plan explicitly called for discharge of student loan sums not paid in the plan, that United had been sent a copy of the plan, that United had filed a proof of claim, which it had been told by the Trustee would not be paid in full, that United did not object to the plan, and that United had been paid every dollar obligated to it under the plan. Excerpts of Record in Ninth Cir. 62 – 70 ("E.R"). Neither ever responded, and instead continued collection efforts.

Eleven years after the plan was confirmed, and only because Espinosa's motion to enforce the injunction forced the issue, United filed a Rule 60(b)(4) motion for relief on the grounds that the order of confirmation was void.

4. Espinosa moved the Bankruptcy Court to reopen the original Chapter 13 case, and moved for a declaration that United had violated the discharge injunction, for a finding of contempt, and for an award of sanctions and damages. E.R. 39. In response, United argued that the order of confirmation was "void" because the Bankruptcy Court had lacked subject matter jurisdiction to confirm an "illegal plan." The supposed illegality was that there had never been an adjudication of undue hardship on the merits. E.R. 85. United also argued that the order violated due process because it had not received notice in the form of an adversary proceeding summons. E.R. 83 – 85.

The Bankruptcy Court held that the due process requirements of *Mullane v. Central Hannover Bank &*

Trust Co., 339 U.S. 306 (1950) were satisfied, that the confirmation order was not void, and that Espinosa was entitled to have the discharge injunction enforced. E.R. 103, 104. As the court put it, "the idea that a creditor with more than 25 days notice of a plan containing a provision that adversely affects it can ignore the proceeding, sit on its rights, and then raise a due process argument years later, defies common sense." E.R. 102.

5. United appealed to the District Court. Again, United raised but two issues – that the order of confirmation was void either because its due process rights had been violated, or for lack of subject matter jurisdiction. E.R. 134. Espinosa's answering brief in the District Court argued that the only issue before the court was whether the confirmation order was void for lack of due process. Espinosa argued that any other attempt to set aside the order of confirmation brought under Bankruptcy Rule 9024 failed because the 180-day time limit within which to do so, established both by 11 U.S.C. 1330, dealing with revocation, and Rule 9024, had long elapsed. E.R. 174.

In its reply brief in the District Court United expressly disavowed any attempt to revoke the plan under section 1330. United argued that Espinosa's contention, that United was seeking to revoke the plan under section 1330, "is simply not accurate – USA Funds instead argues that the confirmation order is void under Fed. R. Civ. P. 60(b)(4)." E.R. 187.

The District Court reversed. Finding that United had been denied due process, the District Court held the confirmation order to be void. E.R. 225.

6. Espinosa appealed the District Court's judgment. In its Ninth Circuit answering brief, United again relied upon its position in the District Court – that relief was appropriate under Bankruptcy Rule 9024 and Civil Rule 60(b)(4) because the confirmation order was void for denial of due process and lack of subject matter jurisdiction. Although sprinkling various other arguments in its brief, such as that res judicata could not apply because the undue hardship was not *actually* litigated, *id.* at 23, and because United's challenge to the confirmation order was not a collateral attack, *id.* at 24, the vast majority of its argument to the Ninth Circuit was based upon due process, *e.g. id.* at 1, 2, 11, 14 – 22, 23 – 32, 39, 40, or lack of subject matter jurisdiction. *E.g. id.* at 40 – 46. Nor did United present to the court any other grounds upon which it was entitled to relief other than to prove the order to be void under Rule 60(b)(4).

The Ninth Circuit issued an opinion remanding the case to the District and Bankruptcy Courts for a limited purpose. *Espinosa v. United Student Aid Fund, Inc.*, 530 F.3d 895 (9th Cir. 2008). The court noted the anomaly that, although Espinosa's confirmed plan explicitly called for a student loan discharge, the form discharge order issued upon Espinosa's successful performance of his plan nonetheless contained language reciting 11 U.S.C. 523(a)(8)'s exceptions to discharge. Thinking that the wrong form discharge order may simply have been automatically generated by the Clerk of the Bankruptcy Court, the court remanded to the Bankruptcy Court, giving it "express leave to consider whether its discharge order in this case was entered as a result of a clerical error and, if so, whether to correct it so as to conform to Espinosa's Chapter 13 plan." 530 F.3d at 899; Pet. App. 59.

Upon remand, the Bankruptcy Court found that the exception from discharge for student loans in Espinosa's discharge order "was inserted because of a clerical mistake, because it was the clear intent of the court, as reflected in the Chapter 13 plan, as approved by the Court, that all student-loan related obligations were to be discharged if the debtor successfully performed the plan." J.A. 48. The court's order corrected the discharge order accordingly. *Ibid.*

The Ninth Circuit then considered the case on the merits and reversed the District Court, holding that Espinosa was entitled to the benefit of the discharge and the injunction enforcing it.

The Ninth Circuit rejected what it characterized as United's "statutory argument," Pet. App. 8, that there had been no discharge because there had been no finding of undue hardship after an adversary proceeding. The court viewed the statutory issue not as one of substantive bankruptcy law, but as one of waiver. "Rights may of course be waived or forfeited, if not raised in a timely fashion." *Id.* at 10. The Court observed that there are perfectly logical reasons why a creditor *would* waive its right to insist on the full-blown adversary proceeding to determine undue hardship. *Id.* at 9, 10. First, a creditor might think a debtor could make a convincing showing of undue hardship and choose to avoid the expense of an adversary proceeding. Second, a creditor may conclude that the Chapter 13 plan provided its best option of collection, "rather than spending years trying to squeeze blood out of a turnip." Pet. App. 9. Third, a creditor may hope a debtor makes some plan payments, but ultimately fails to complete the plan, in which event the creditor is free to attempt further

collections. The Ninth Circuit observed that such is not an unrealistic prospect, given that an estimated two-thirds of Chapter 13 plans ultimately fail. *Id.* at 10 & n. 2.

The court concluded that "[r]egardless" the reason, "when the creditor is served with notice of the proposed plan, it has a full and fair opportunity to insist on the special procedures available to student loan creditors by objecting to the plan on the ground that there has been no undue hardship finding." *Id.* at 10. Because United did not object, it therefore waived its right to those "special procedures," and allowed the plan of confirmation to become final. The court held that the plan finality mandated by 11 U.S.C. 1327 governed and did not conflict with "those provisions of the Code and Rules that call for an adversary proceeding before a student loan debt may be discharged." *Id.* at 9.

Judge Kozinski then turned to United's due process argument, noting that United had received actual notice. Pet. App. 21. The court concluded that the receipt of actual notice eliminated a due process issue altogether. "Because 'due process does not require actual notice,' *Jones v. Flowers*, 547 U.S. 220, 225 (2006), it follows a fortiorari that actual notice satisfies due process." *Ibid.* The opinion portrays the facts underlying United's notice issue in blunt, but accurate, terms:

> "It makes a mockery of the English language and common sense to say that Funds wasn't given notice, or was somehow ambushed or taken advantage of. The only thing the creditor was not told is that it could insist on an

> adversary proceeding and a judicial determination of undue hardship. But that's less a matter of notice and more of a tutorial as to what rights the creditor has under the Bankruptcy Code – a long form *Miranda* warning for bankers. If that were the standard for adequate notice, every notification under the Bankruptcy Code would have to be accompanied by Collier's Treatise, lest the creditor overlook some rights it might have under the Code." Pet. App. 16.

The opinion considered and declined to accept the views of *Ruehle v. Educ. Credit Mgmt. Corp. (In re Ruehle)*, 412 F.3d 679 (6th Cir. 2005), *In re Hanson*, 397 F.3d 482 (7th Cir. 2005) and *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296 (4th Cir. 2002), that constitutional due process required service of a summons and complaint for an adversary proceeding. Pet. App. 22 – 25. The court saw the approach taken by those circuits as one under which "a creditor who is entitled to heightened notice by statute is also entitled to such heightened notice as a matter of due process." *Id.* 22. The court demonstrated its problem with "this novel approach" by quoting the attempt in *In re Banks, supra*, to explain its rationale: "'We do not today hold that the Constitution in itself requires a summons and service of process to discharge student loan debt. We merely confirm that where the Bankruptcy Code and Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect.' 299 F.3d at

303 n. 4."[1] *Id.* 22. The Ninth Circuit disagreed with the proposition that Congress can dictate what due process the constitution requires; and observed that in any event, Congress did not even purport to do so. *Id.* 23.

In sum, the Ninth Circuit said, "We reject the idea that a creditor who is in the business of administering student loans has a *constitutional* right to ignore a properly served notice that clearly specifies that its debt will be discharged on successful completion of the plan."[2] App. 24.

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[1] The conundrum contained in this quote from *In re Banks* accurately describes the rule that Petitioner and its amici seek from this court. The same rationale is pervasively contained in their briefs. *E.g* Brief of National Council of Higher Education Loan Programs, Inc., at 37 – 30 (Acknowledging that the Fifth Amendment to the Constitution does not expressly require a summons and yet arguing that due process required use of a summons).

[2] The Court also observed that some courts seemed "uncomfortable with the practice" of debtors proposing in their plans that creditors waive an adversary proceeding to determine undue burden, and that some courts had even "announced that they won't confirm plans that seek to discharge student loan debts without an adversary proceeding, even when the creditor fails to object to the plan." Pet. App. 25. The Court said that, given current circuit law holding that student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, "Bankruptcy Courts have no business standing in the way." Pet. App. 26. Given the existing circuit precedent, Judge Kozinski's logic seems unassailable. Yet *amici* criticize the court's statement. *E.g* Brief, *amicus curiae* States at 5, 39. This Court needn't deal with this part of the opinion, because it is not part of the holding or resolution of Espinosa's case.

SUMMARY OF ARGUMENT

1. United waived its several opportunities to insist upon an express finding of undue hardship. It did not object to, appeal from, or move to set aside the plan. United much later filed a Rule 60(b)(4) motion. Therefore, it can now only prevail if the judgment confirming the plan is void.

United argued below that the confirmation order was void for two reasons. One was that without a finding of undue hardship, the plan conflicted with three Code provisions, and therefore the Bankruptcy Court had lacked authority to enter the order it did. The other was that – even though United had actual notice of the plan and the hearing – Espinosa's failure to initiate an adversary proceeding and use a summons rendered the confirmation order void for lack of constitutional due process. United's claims based on the Code are ordinary claims of legal error that are raised far too late – years after the unappealed confirmation order became final. And United's due process claim is just plain wrong for a host of reasons, including that United had actual notice of the bankruptcy proceeding and Espinosa's request to discharge his student loans.

2. United is faced with a confirmed plan that became final long ago. Section 1327 makes the plan binding upon United, just as it is upon Espinosa. Further, this Court has long held that after a judgment, including a bankruptcy judgment, has become final, it cannot be challenged for error contained in the order. Indeed the Court has held that even the existence of subject matter jurisdiction of a

final judgment cannot be re-litigated after the judgment is final.

Citing cases of this Court that are from 80 to 170 years old, United urges the Court to hold that the order confirming Espinosa's plan, containing language directing partial student loan discharge, was "not within the powers granted the Bankruptcy Court by law," and thus was void. United overlooked cases as recent as *Travelers Indem. Co. v. Bailey,* 129 S. Ct. 2195 (2009) which demonstrate that the Espinosa confirmation order fell well within the Bankruptcy Court's authority, and well outside the narrow category of judgments that are void because the court acted outside of the powers granted it by law.

United alternatively argues that the finality of the plan is immaterial because the plan does not affect student loans in any way. It argues that 11 U.S.C. 523(a)(8) is "self executing," based upon one sentence in a Senate Report for the 1978 Bankruptcy reform act, and a reference to that sentence in *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440 (2004). But "self executing" simply means that if no affirmative action is taken to grant a student loan discharge, 11 U.S.C. 523(a)(8) governs and such a loan is not discharged. It says nothing about whether the requirement of section 523(a)(8) can be waived, as United did here by failing to object, nor whether the final, unappealed confirmation order in this case is void. In the plan confirmation context, the court orders the discharge in a formal recognized proceeding that encompasses notice and a hearing opportunity. This affirmative act by the court effectively rebuts the "presumption" of non dischargeability that is suggested in *Hood* and the Senate Report.

In an issue not raised below, and therefore not properly before this Court, the United States argues that the terms of 11 U.S.C. 523(a)(8), mean that a confirmed plan has no impact upon whether a student loan can be, or even *has been* discharged. The United States argues that such meaning should be derived from the fact that the language of section 523(a)(8) differs from that of other subsections of 523(a) as well as from that of other Code sections. But 11 U.S.C. 523(a)(8) differs from other sections only because it is the only obligation the discharge of which is subject to an exception based upon the debtor's financial condition. It does not magically insulate the student loan obligation from the plan's explicit order discharging obligations.

3. United's due process argument is defeated at the outset by the fact that it had received "actual notice." This Court and lower courts have held that when a party has actually received notice, due process is not implicated.

4. United makes the same argument here that Judge Kozinski properly rejected. Even though the Constitution in and of itself does not require a summons and service of process to discharge student loan debt, United nonetheless contends that where the Code and Rules require a "heightened degree of notice," due process entitles a party to receive such notice before it can be bound by the resulting order. This is incorrect.

To begin with, neither 11 U.S.C. 523(a)(8) nor any other provision of the Code mandates the use of adversary proceedings to determine dischargeability of student debt; only the rules do. Therefore, even if

Congress could dictate the requirements of due process, it did not do so in this instance. Secondly, such an argument contradicts *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440 (2004), which held that the Constitution does not mandate the use of adversary proceedings and the summons process to give a creditor notice of proposed discharge of a student loan.

The notice given by Espinosa complied with *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). Given that the notice related to a plan confirmation hearing, the notice specified in the Rules for plan confirmation hearings was "appropriate in the circumstances." The notice was full and complete. It contained the actual wording of the plan's discharge provision. It was given four months before the hearing date.

United contends that due process requires an adversary summons because of the high volume of mail that it and other creditors must contend with, apparently to demonstrate why only a summons for an adversary proceeding could be reasonable notice under the circumstances. United claims it may, in effect, ignore any notice of a Chapter 13 case except pleadings for an adversary proceeding. These arguments are unpersuasive. As a loan guaranty agency, United owes duties to the United States Department of Education to act diligently and to take various actions related to a student loan Chapter 13 case. Moreover, United's argument that it risks missing a notice of plan confirmation is unpersuasive. United has never explained why it did not object to Espinosa's plan or appeal from it.

ARGUMENT

I

BECAUSE UNITED SOUGHT RELIEF UNDER FEDERAL CIVIL RULE 60(b)(4), THE ONLY ISSUE IS WHETHER THE CONFIRMATION ORDER WAS VOID.

When United filed its response to Espinosa's motion to enforce the injunction, it relied on Rule 9024 and Civil Rule 60(b)(4). Espinosa argued to the District Court that United's motion had not been brought within the 180 days permitted by Section 1330 and Rule 9024 for a motion to revoke a plan. E.R. 174 In response, United expressly disavowed any intention to seek revocation of the plan under Section 1330, and relied exclusively on arguments that the plan was void either because United had not received constitutional due process or because the Bankruptcy Court lacked subject matter jurisdiction to confirm a plan containing provisions contrary to sections of the Code.[3]

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[3] *Amicus curiae* Professor Rafael I. Pardo suggests that United's Rule 9024 and Civil Rule 60(b)(4) motion for relief from the confirmed plan was actually a motion to revoke the plan. Br. at 6. Thus, he contends, the Bankruptcy Court may have lacked subject matter jurisdiction over United's motion for relief from the confirmation order because the 180-day time limitation is jurisdictional. Br. at 7. Espinosa does not disagree with Professor Pardo's discussion of the issue. But in any event, United's disavowal of any attempt to revoke the plan, or of any basis for relief except through Civil Rule 60(b)(4), limits the issue of this case to whether the order of confirmation was void. Nevertheless, Professor Pardo's argument underscores how United has tried to do an end run around the basic rules of finality in its challenge to a plan to which it never objected.

E.R. 186, 187.

United's motion for relief of judgment made the only argument it could eleven years after a judgment was entered – that under Rule 60(b)(4) the judgment was void. Unless and until it can prevail in setting aside the judgment, United's merits–based arguments are irrelevant. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n. 7 (1978); 12-60 Moore's Federal Practice – Civil § 60.68. Even if United has a valid basis to attack the judgment, it cannot be considered unless United obtains relief under Rule 60(b)(4) from a void judgment. The merits arguments would then be ripe for consideration in further proceedings. But United and its *amici* make irrelevant merits-based arguments, nonetheless. Great portions of the Briefs of United and its supporting *amici curiae* make merits arguments – albeit dressed up in voidness clothing – which do not support a finding that the confirmation order was void. Such arguments include:

- That a student loan cannot be discharged unless not to do so would impose an undue hardship upon the student. 11 U.S.C. 523(a)(8). Br. at 17 – 20. That allowing a discharge without the undue hardship finding is "inconsistent with the background and purposes" of the section. Brief of United States, at 23 – 26. And that "treating an undue hardship finding as a precondition to discharge is fair to both debtors and creditors." *Id.* at 26 – 29.

- That Congress has several times amended the Code to restrict the dischargeability of student loans. Br. at 20 – 23, and that a sentence from a Senate Report related to the 1978 Bankruptcy Reform Act

emphasize Congress's intent that student loans not be easily dischargeable. Br. at 23 – 25. These arguments emphasize Congressional intent for 11 U.S.C. 523(a)(8). They hardly imply that the final confirmation order was void.

• That a confirmed plan discharging student loan obligations without making an undue hardship finding conflicts with several Code sections, such as 11 U.S.C. 1322, establishing what should and may be included in a plan, and also requiring a plan to conform to the Code; and 11 U.S.C. 1325(a), mandating that a plan must conform to the Code. Br. at 25 – 30. These arguments and these Code sections mean simply that – unless waived – a plan not having a finding of undue hardship which nevertheless discharges student loan obligations should not be confirmed.

• That 11 U.S.C. 1327's dictate of finality does not apply where the plan does not conform to Code provisions like 11 U.S.C. 523(a)(8), 1322, and 1325 "because doing it ignores the clear intent of Congress and the Judicial Conference to require proof of undue hardship through an adversary proceeding." Br. at 41 (although no statute imposes a requirement for adversary proceedings). But once a plan becomes final section 1327 does apply, irrespective of error in its contents. This is simply an argument of error that should have been raised in the Bankruptcy Court and then by appeal, and an argument that could be, and was, waived.

• That policy reasons underlie the requirement of Rule 7001 that discharge determinations, including undue hardship determinations, occur in adversary proceedings. Br. at 43 – 51. (The policy reasons are

said to arise from Congress's requirement of an adversary proceeding. Br. 43. But that is not true. No statute imposes a requirement for adversary proceedings.)

Here United must prove the plan to have been void, and none of the above arguments relate in any way to that issue.

II

THE PLAN WAS FINAL AND BINDING UPON UNITED WHETHER OR NOT PROVISIONS IN IT CONTAINED LEGAL ERRORS, INCLUDING OF SUBJECT MATTER JURISDICTION.

A. The plain language of the confirmed plan and of 11 U.S.C. 1327 compel a holding that the unpaid student loan obligations were dischargeable.

Espinosa's Chapter 13 plan said:

> "(4) Any amounts or claims for student loans unpaid by this Plan shall be discharged." JA 26.

The Bankruptcy Court confirmed the Plan. JA 43.

Code section 1327(a) says:

> "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has

objected to, has accepted, or has rejected the plan."

United had its opportunity to object to the above-quoted term in the Plan, by objecting before the confirmation hearing, by three different available post-hearing motions, and by appeal. It chose none of them. It is bound by the plan, including the above-quoted term.

B. A plan confirmed by a final order is binding even if it contains errors of law, a basic tenet of law supported by long-established precedent, which this Court reaffirmed in *Travelers Indemnity Co. v. Bailey*, 129 S.Ct. 2195 (2009).

"[T]he finality of the Bankruptcy Court's orders following the conclusion of direct review generally stands in the way of challenging the enforceability of the injunction." *Travelers Indem. Co. v. Bailey*, 129 S.Ct. 2195, 2198 (2009). That principle applies here without exception. *Travelers* involved a Bankruptcy Court order confirming a Chapter 11 reorganization plan, specifically considering the validity of the injunction against collection action against debtors and related persons. It came to this Court as an action to enjoin actions that would violate the order. The Second Circuit had concluded that it could determine for itself whether the original order fell outside the scope of the Bankruptcy Court jurisdiction, and decided that it did. This Court reversed, saying that "where the plain terms of a court order unambiguously apply as they do here, they are entitled to their effect." 129 S. Ct. at 2204. "[O]nce the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy

court jurisdiction and power), they became res judicata to the parties . . . not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . Those orders are not any the less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction. For even subject-matter jurisdiction . . . may not be attacked collaterally." *Id.* at 2205, (internal quotes and cites omitted.) So, too here. *Travelers* recognized that "The rule is not absolute, and we have recognized rare situations in which subject matter jurisdiction is subject to collateral attack." *Id.* at. 2206 n. 6, But as more fully explained below, p. 25, this case does not present one of those "rare situations."

Travelers reaffirmed a well established rule, specifically for bankruptcy cases. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

In *Taylor*, the debtor claimed proceeds of a lawsuit were exempt from inclusion in the bankrupt's estate, under 11 U.S.C. 522. The trustee made no objection within the time specified by Rule 4003(b), and indeed no objection at all. The trustee later sought to exclude some of the proceeds from exemption, arguing a narrow interpretation of section 522. *Taylor*'s arguments are just like those made by United. Taylor argued that enforcing the terms of section 522 and the time limit in Rule 4003(b) would "create improper incentives. He asserts that it will lead debtors to claim property exempt on the chance that the trustee and creditors, for whatever reason, will fail to object to the claimed exemption on time. He asserts that only a

requirement of good faith can prevent what the Eighth Circuit has termed 'exemption by declaration.' "503 U.S. at 644.

Taylor attacked the debtor's action as "exemption by declaration," *id.* at 244, using the same pejorative term commonly used by student loan creditors.[4] *Ibid.* But this Court concluded that:

> "This concern, however, does not cause us to alter our interpretation of § 522(1). Debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings. See, *e.g.*, 11 U.S.C. § 727(a)(4)(B)(authorizing denial of discharge for presenting fraudulent claims); Rule 1008 (requiring filings to 'be verified or contain an unsworn declaration' of truthfulness under penalty of perjury); Rule 9001 (authorizing sanctions for signing certain documents not 'well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law'); 18 U.S.C. § 152 (imposing criminal penalties for fraud in bankruptcy cases.)" 503 U.S. at 644.

Just as in *Taylor*, the possibility that a lawyer or a client engaged in possibly sanctionable conduct has no bearing on finality. Moreover, in this case, after a hearing, JA 41, the Bankruptcy Court confirmed the

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[4] See United brief at 14, 24; Brief of Educational Credit Management Corp. at 5, 35; Brief of National Council of Higher Education Loan Programs, Inc. at 3, 20; Brief of States at 3.

plan in an order that explicitly found the plan to have been proposed in good faith. JA 42. United does not now, and has never, contended that Espinosa's plan was offered in bad faith or was accomplished through fraud.

The rule that United is bound by the terms of the confirmation order is also made clear by *Chicot County Drainage Dist. v. Baxter State Bank.*, 308 U.S. 371 (1940). The Drainage District conducted a proceeding in the District Court to effect a plan of readjustment. The District Court's jurisdiction arose under a statute providing municipal debt readjustments. A plan of readjustment was confirmed, under which the Bank had one year to present claims for payment. Later the federal statute upon which the municipal debt readjustment bankruptcy regime was based was held unconstitutional. For that reason the Court of Appeals held the plan to be void and did not deem its one year limit binding on the Bank when it claimed on its bonds. The Court reversed. It held that 1) all required elements for making the plan binding on the Bank were present, such as notice, the Bank being a party to the readjustment, and the like; 2) although no question had been raised in the readjustment case to the constitutionality of the jurisdictional statute, such a challenge *could have* been made; 3) therefore, even though later the statute was held unconstitutional, the judgment of the District Court was binding upon the Bank. This Court found the order confirming the plan not to be void, but to be binding.

Knowing that it needs to convince this Court that the Bankruptcy Court acted in an extraordinary excess of its statutory powers to conduct bankruptcy proceedings, United, aided by *amici curiae*, makes four

different arguments to get around the finality that 11 U.S.C. 1327(a) imposes upon it, and the limitation of Rule 60(b) relief to void orders. First, United argues that, indeed, the Bankruptcy Court's action was so far outside its statutory authority as to make the order void. Second, it argues that because there is a sentence in a Senate Report related to the Bankruptcy Reform Act of 1978, describing 11 U.S.C. 523(a)(8) as "self executing," a Chapter 13 plan could not have any impact on the issues of discharge and undue hardship in section 523(a)(8), even if the parties wanted it to. Third, the United States argues that the phrasing of 11 U.S.C. 523(a)(8) itself also immunizes student loan discharges from any treatment by a Chapter 13 plan. This argument was not raised by the parties below and therefore is not before this Court. Finally, United argues that because the erroneous 1997 discharges controls, the finality of the plan is immaterial. Each is incorrect.

C. The Bankruptcy Court did not depart so significantly from its statutory authority that its order should be treated as void.

United argues that the confirmation order was void because it was not within the powers granted to the Bankruptcy Court by law. Br. p. 31. Such was not the case.

This issue is resolved by *Travelers Indem. Co. v. Bailey*, 129 S.Ct. 2195, 2206 n. 6 (2009), a case ignored by United. *Travelers* demonstrates that the order of confirmation here cannot be voided on this basis.

After having found the confirmation order at issue in *Travelers* binding this Court observed that the rule

espoused in *Chicot County Drainage Dist. v. Baxter State Bank.*, 308 U.S. 371 (1940) "is not absolute, and we have recognized rare situations in which subject-matter jurisdiction is subject to collateral attack." 129 S. Ct. at 2206 n. 6. Examples were cited, such as for sovereign immunity, or state court actions where a federal statute expressly divested the state court of jurisdiction. *Ibid.* While stating that "This is no occasion to address whether we adopt all of these exceptions," the Court cited the Restatement (Second) of Judgments § 12 p. 115 (1980) for three potential exceptions to the rule that even subject matter jurisdiction may not be collaterally attacked. 129 S. Ct. at n. 6. One of them might theoretically be considered here:

> "(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction." *Ibid.*

A hypothetical following this quotation of the Restatement clarified its potential meaning. The Court said: "This is not a situation, for example, in which a bankruptcy court decided to conduct a criminal trial, or to resolve a custody dispute, matters 'so plainly beyond the court's jurisdiction' that a different result might be called for." *Ibid.*

This is not a case where the Bankruptcy Court was acting in a judicial arena completely foreign to it. The court was acting in a Chapter 13 case. Its order dealt

with payment of debts, and discharge. The order affected the debtor, Espinosa, a trustee, and Espinosa's only creditor, United. United's reliance upon an "error" because it had no express finding of undue hardship hardly constitutes a dispute over subject matter jurisdiction, let alone an issue of subject matter jurisdiction "'so plainly beyond the court's jurisdiction' that a different result might be called for." *Ibid.*

United ignores the considerations in *Travelers* just discussed. Instead it cites *United States ex. rel. Wilson v. Walker,* 109 U.S. 258 (1883) for its statement that if a court enters a decree "not within the powers granted to it by law," the decree is void even though that court has jurisdiction of the parties as well as subject matter jurisdiction. *Id.* at 266. Br. at 31. The cited statement by the Court applied to a probate proceeding in the District of Columbia. The surety on the administrator's bond was sued when the administrator refused to pay over a sum of money. This Court held that the probate court had power to order an administrator to pay or deliver property of the decedent which had not yet been administered, but not to decree that the administrator pay money which had been received and held personally. The Court held that an order to turn over monies held personally was beyond the power conferred by the statute, not within the jurisdiction of the court, and was, therefore, void." But the holding of *Wilson* that a court lacked jurisdiction to deal with particular property does not obtain here. Clearly the Bankruptcy Court had jurisdiction over the United student loans. *E.g. Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440, 447 (2004)(bankruptcy an *in rem* proceeding having jurisdiction over debts and assets....)

Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348 (1920), cited by United, Br. at 31, is more instructive. There, this Court held that where Congress had explicitly excluded insurance companies from administration in federal Bankruptcy Court, any such administration was void, even where the company had not only been aware of the case but assisted the trustee. But *Vallely* involved both lack of jurisdiction over the party, an insurance company, and of the subject matter, bankruptcy administration of an insurance company. Here, regardless of whether the Bankruptcy Court correctly or incorrectly confirmed a plan granting partial discharge of a student loan, the Bankruptcy Court had jurisdiction of Espinosa, his debts including student loans, and the dischargeability of such debts. The court was not exceeding its authority.

Finally, United also cited *Wilcox v. Jackson*, 38 U.S. 498 (1839), in which the Court held that if land service registrars, who had the power to grant "pre-emption rights" in certain lands, and were said to be acting "judicially," granted such preemptions to lands not identified in federal legislation as qualifying for such treatment, orders granting the preemptions were void. *Wilcox* is of little assistance in deciding this case.

D. The Bankruptcy Court correction of the clerical error in the discharge order is not before this Court, and in any event was correct.

United contends that the order correcting the clerical error was improper because it changed the "substance" of the discharge order, and therefore

cannot "relate back" to the plan confirmation order. Brief p. 42.

The United States contends that United did not have to appeal the confirmation order because the discharge in fact excluded any debt for a student loan. Brief of the United States, p. 21. Further, the United States contends, notwithstanding that the Bankruptcy Court in 2008 found a clerical mistake, that it is equally plausible that the Bankruptcy Court when issuing its discharge order in 1992 recognized, "perhaps belatedly" that a student loan could not be discharged without a finding of undue hardship, and thus issued the discharge with the exception still included. Br. at 22.

Educational Credit Mgmt. Corp. argues that the order conforming the discharge order to the confirmed plan was error because it made a "substantive change." Br. at 24.

None of these contentions can be considered, because after the Bankruptcy Court corrected the clerical error, United made no objection to it in the court of appeals, and did not raise it as an issue for this Court to decide until its opening brief. Thus, this issue may not be considered by this Court. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 n. 1 (1991)(Court does not normally consider issues raised by an *amicus curiae*). In any event, the correction of the clerical error was proper.

"Rule 60(a) applies when the record indicates that the court intended to do one thing but, by virtue of a clerical mistake or oversight, did another." 12-60

Moore's Federal Practice - Civil § 60.11 [1][a]. As the Seventh Circuit has said: "If the flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction . . ." *United States v. Griffin*, 782 F.2d 1393, 1396-1397 (7th Cir. 1986).

Invocation of Rule 60(a) is proper so long as the court's correction is intended to conform the judgment to the original intention of the court. *Harman v. Harper*, 7 F.3d 1455, 1457 (9th Circuit 1993) *Harman* further explained that use of Rule 60(a) is proper to correct a "ministerial mistake" or to correct "blunders in execution" as opposed to "instances where the court changes its mind." *Ibid.* The Bankruptcy Court did precisely that. It conformed the discharge order to the intent of the plan. The argument of the United States, that perhaps the Bankruptcy Court had belatedly changed its mind and denied the discharge, is directly contrary to the finding of the Bankruptcy Court. J.A. 48.

United argues that the order correcting the clerical mistake "could not relate back" to the confirmation order, citing *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator, Co.*, 344 U.S. 206 (1952). Br. 42. *Minneapolis-Honeywell* simply held that amending a judgment in the court of appeals did not start anew the time within which to seek certiorari. How that proposition bears on the issue before this Court is not apparent.

E. Characterizing 11 U.S.C. 523(a)(8) as "self executing" is not relevant to the decision whether Espinosa's confirmed plan is binding upon United.

When Congress adopted the Bankruptcy Reform Act of 1978, The Senate issued a report summarizing the act. In its summary of 11 U.S.C. 523(a)(8) the Senate Report said: "This provision is intended to be self executing and the lender or institution is not required to file a complaint to determine the dischargeability of any student loan." S. Rep. No. 95-989 p. 79 (1978). Taken at face value, this says nothing different than does the language of the statute itself – a student loan is not to be discharged unless not to do so would impose an undue hardship.

This snippet from the Senate Report gained considerably more currency when, in *Tenn. Student Assistance Corporation v. Hood*, 541 U.S. 440 (2004), the Court said: "Section 523(a)(8) is 'self executing.' [3 W.] Norton [Bankruptcy Law and Practice 2d] § 47:52, at 47-137; see also S. Rep. No. 95-989, p. 79 (1978). Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." 541 U.S. 450. That statement was apparently included because the creditor argued that this statement "singled out" student loans, and the Congress thereby "authorized a suit against the state." *Ibid.* It is clear from the ultimate resolution of the case, which turned upon the Court's holding that neither Congress nor the Constitution mandated the use of an adversary proceeding, that the Court placed no great significance upon the "self executing" phrase. *Id.* at 453. Nor should this Court now hold that this one sentence from

a Senate Report, which does not purport to explain or add meaning to any specific language in the section, means that either Congress or the Court in *Hood* intended that a section 523(a)(8) issue could not be waived, nor affected in any way – positively or negatively – by a confirmed plan having express language dealing with student loan discharges.

From the Senate report and the short statement in *Hood, supra,* United concludes that a creditor has no duty to object to a plan containing discharge language but no undue hardship finding, and can ignore a Chapter 13 case completely because there was no summons for an adversary proceeding. Br. at 33 – 36.[5] The logic invoked by United is this: Based upon a single sentence in a Senate Report for one of a series of Bankruptcy Code amendments, this Court should hold that 1) the Code requires the use of an adversary proceeding; 2) Such a requirement necessarily means that student loan discharges *cannot* be dealt with in a plan, absent an adversary adjudication of undue hardship; 3) a creditor can entirely disregard actual notice, need not read a notice or plan, and has no duty to object and bring error to the attention of a Bankruptcy court for it to remedy even when its filed claim is partially rejected; and 4) debtor and creditor cannot agree to waive the requirement of an undue hardship hearing; indeed under United's view the parties could not enter into a formal, written stipulation to that effect.

United's reliance upon the characterization of section 523(a)(8) as "self executing" cannot support a

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[5] The United States makes the same argument, Br. p. 13.

finding that the confirmation order was void. Rather, it is one of the ordinary arguments of error that could have been included in an objection to the plan, or in an appeal. Further, citing the "self executing" label cannot justify holding that a confirmed plan which expressly dealt with student loan discharge, and to which a creditor waived any objection, is not covered by the finality provision of 11 U.S.C. 1327.

F. The terms of 11 U.S.C. 523(a) and (a)(8) do not support a unique interpretation, the effect of which is to nullify plain language in a plan calling for discharge.

The United States raises an issue that United has not, and which was neither addressed below nor included as a question presented in this Court. It contends that a student loan discharge is an issue completely divorced from plan confirmation proceedings, such that the creditor can ignore a plan and its confirmation hearing, and has no duty to object to a plan which does not contain a finding of undue hardship. It bases this contention on an issue of statutory interpretation argument not raised by United below, or in its petition for certiorari. The issue is waived because it was not raised below, *TRW*, Inc. *v. Andrews*, 534 U.S. 19, 34 – 35 (2001), and even now is raised only by an amicus, not a party. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 n. 4 (1991).

The United States says, first, that because 11 U.S.C. 523(c) places the burden to prevent a discharge of certain obligations on the creditor, and the snippet from the Senate Report imposes a duty on the debtor to seek discharge of a student loan, the "self executing"

nature of section 523(a)(8) divorces treatment of undue hardship from plan confirmation. Br. at 18.

Second, says the United States, the first clause of 11 U.S.C. 523(a) reads that "a discharge . . . *does not discharge* an individual from any debt [enumerated in sub-parts (1) through (19)]," (emphasis added), and that the wording of section 523(a)(8), which begins with the proviso "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor . . . " is only found in 523(a)(8). Therefore, says the United States, that unique wording makes paragraph (a)(8) mean that the discharge of a student loan – but only that kind of obligation – must stand separately from plan confirmation proceedings. But the distinction exists because section 523(a)(8) is the only paragraph under 523(a), and the only non-dischargeable debt, which is subject to an exception for debtor hardship. There should be no other significance than that, given to the "unless" language of (a)(8).

Third, the United States say that the intention that 523(a)(8) discharges stand apart from confirmation proceedings is demonstrated by the fact that the "does not" wording of section 523(a) is different from language used by other provisions of the Code, covering such disparate subjects as the award of attorneys fees, or acts that bankruptcy courts "shall not" or "may not" do. Br. at 17 – 19 and nn. 6, 7. But such word comparisons are irrelevant. There is no logical connection between these language comparisons and the conclusion that the United States wishes the Court to draw. The various sections deal with various circumstances. That section 523(a) uses

the phrase "does not" simply applies to exceptions from discharge.

There is no dispute that if United had wanted an undue hardship determination, and had wanted it in an adversary process, it could have objected, and would have gotten it. But it didn't. Why the differing statutory wordings that the United States discusses imply that United couldn't waive that right, and conversely could totally ignore the plan confirmation litigation, is not explained.

III

THIS IS A WAIVER CASE, NOT A DUE PROCESS CASE. UNITED RECEIVED ACTUAL AND TIMELY NOTICE OF THE PLAN AND THE DATE OF THE CONFIRMATION HEARING, FILED A PROOF OF ITS CLAIM, AND THEN DID NOTHING.

When a party actually receives notice of proposed action and the time and place where its objection may be heard, procedural due process is not implicated.

As both the Bankruptcy Court and the Ninth Circuit found, United received actual notice. The notice was timely. It occurred more than four months before the hearing to confirm the plan. E.R. 28. United was expressly warned that the plan would pay $13,250.00 of its claim of $17,832.15, but discharge the rest, as well as any further obligations. E.R. 25. United's entire argument is about the *quality* of the notice it received, notwithstanding that it received actual notice. *See, e.g.* Br. at 53 (notice merely went to P.O. Box); at 54 (complaining that Espinosa did not

give "heightened notice" required by Rule, and erroneously contended by United to be required by the Code). However, the fact remains: United had not only actual notice, but knowledge.

This is not a constitutional due process case. How could it be, when United's legal department received notice months before the hearing and knew exactly what it had to do? It is a waiver case.

The Ninth Circuit correctly held that where a party has received actual notice, there is no issue of due process. Pet. App. 21. This is consistent with cases of this Court and lower courts.

This Court has recognized that no due process issue arises where actual notice was received. *City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999)(Individual received actual notice of property seizure, "Accordingly, we need not decide how detailed the notice of the seizure must be or when the notice must be given."); *National Equipt. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964)("we need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice . . ."); *Nelson v. City of New York*, 352 U.S. 103, 107 (1956)(no due process issue where actual notice received, but was concealed by employee, and where managing agent carelessly overlooked notice).

The notion that a party who had actual notice and an opportunity to be heard was nonetheless denied due

process seems to be virtually non-existent outside of these student loan cases. Since it is true that "due process does not require actual notice," *Dusenbery v. United States*, 534 U.S. 161, 171 (2002);[6] *Jones v. Flower*, 547 U.S. 220 (2006), the issue normally is whether the notice given comported with the due process clause even though not actually received.

Cases from the lower courts also hold that actual notice vitiates any argument of denial of due process. *See, e.g.*:

- *Andersen v. UNIPAC-NEBHELP*, 179 F.3d 1253 (10th Cir. 1999).[7] The lender received actual notice. "Therefore, it appears that due process has been afforded." *Id.* p. 157 fn. 6.

- *In re Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990)(Chapter 13 case. "Due process does not always require formal, written notice of court proceedings; informal actual notice will suffice.")

- *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 302-303 (2d Cir. 2005)(due process requirement of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) satisfied by actual notice even though service in

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[6] Espinosa uses the term "actual notice" to mean "*receipt* of notice," just as this Court did in *Dusenbery*. 534 U.S. at 170 n. 5.

[7] *Overruled on other grounds* by *Educational Credit Management Corp v. Mersmann*, 505 F.3d 1033 (10th Cir. 2007).

foreign country did not comply with Hague Convention)[8];

• *United States v. Casciano,* 124 F.3d 106, 112-113 (2d Cir. 1997) *cert. den.* (1997)(due process requirement of notice of protection order satisfied by actual notice even though service was invalid);

• *Sullivan v. Choquette,* 420 F.2d 674, 676 (1st Cir. 1969) *cert. den.* (1970)(service of process of writ improper but due process satisfied by wife informing party of its existence);

• *Grammenos v. Lemos,* 457 F.2d 1067, 1070 (2d Cir. 1972)("The standards set in Rule 4(d) for service on individuals and corporations are to be liberally construed, to further the purpose of finding personal jurisdiction in which the party has received actual notice.").

United, joined by supporting *amici curiae*[9] argues that *City of New York v. New York, New Haven & Hartford RR.*, 344 U.S. 293 (1953) supports its argument that irrespective of whether it had notice of Espinosa's case, it was entitled, as a matter of constitutional law, to the kind of notice specified for adversary proceedings. Br. 54, 56, 57. The statement

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[8] This case demonstrates why the United States' argument, Br. at 15, and some of the cases there cited, blur the difference between service of process to acquire jurisdiction for a law suit, and due process notice.

[9] Briefs *amicus curiae* of United States, p. 15, Educational Credit Management Corp., p. 12; State of Oregon, *et. al.*, pp. 26, 35; *International Municipal Lawyers Association*, pp. 10, 13.

relied upon from *City of New York* is that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." 344 U.S. at 297. But the case is not relevant here. *City of New York* involved a reorganization. The city was aware of the reorganization. But the city was not aware of a court order barring claims unless filed before a cutoff date. The city had been given no notice of any kind – mail or otherwise – of the order. The Court held that creditors had no duty to "inquire for themselves *about possible court orders* limiting the time for filing claims." *Ibid.* (emphasis supplied.) Here, United did have notice of a possible court order limiting its rights. Moreover, *City of New York* did not discuss what particular notice might be required. The issue was whether any kind of notice at all was required.[10]

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[10] Here, as in others of its arguments, United expresses yet again the erroneous contention that "the Bankruptcy Code and the Rules establish heightened procedural protections for the discharge of student loan debts . . ." United then argues that *City of New York* compels the giving of those "heightened procedures." Br. at 54. The Code does *not* prescribe any procedural matters for student loan discharge. And *City of New York* did not adjudicate what notice was required – just whether notice was required.

IV

DUE PROCESS IS NOT OFFENDED WHEN DISCHARGEABILITY OF STUDENT LOAN DEBT OCCURS THROUGH A PROPERLY NOTICED PLAN CONFIRMATION INSTEAD OF AN ADVERSARY PROCEEDING.

Even if the record in this case did not demonstrate that United had received actual notice, the confirmation order would not be void for lack of due process notice. Rules adopted by this Court do not establish the parameters of constitutional procedural due process. *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440, 454 (2004)(The Bankruptcy Rules shall not abridge, enlarge, or modify any substantive right.) Neither do acts of Congress establish the scope of due process, although that is irrelevant, since Congress has not required adversary proceedings to determine dischargeability of student loan debts. Therefore whether Espinosa should have served a summons and complaint for an adversary proceeding about undue hardship is immaterial to any due process challenge.

A. Congress has not required a debtor to use an adversary proceeding for an undue hardship determination.

To an amazing degree, the arguments of United and its supporting *amici* rest on a completely mistaken notion that 11 U.S.C. 523(a)(8) or some other provision of the Code mandate that an undue hardship finding *must* come about through an adversary proceeding – even, it seems, when the debtor and the creditor both want to waive it. This misperception underlies both

United's statutory interpretation argument and its due process argument.

But that is not so. Congress adopted no such provision, and this Court has made that plain: "The text of § 523(a)(8) does not require a summons . . . " *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440, 453 (2004). There is nothing in the plain language of 11 U.S.C. 523(a)(8) from which it could even be suggested that the section mandates use of an adversary proceeding.

B. The due process clause of the constitution did not require Espinosa to employ an adversary proceeding.

There is no due process violation merely because an adversary proceeding was not invoked. *Tenn. Student Assistance Corporation v. Hood,* 541 U.S. 440, 453 (2004).

In *Hood,* the Court considered whether a debtor's proceeding in Bankruptcy Court to discharge a student loan owed to a state implicated the Eleventh Amendment. If it did, the Court would have to decide whether, under the Bankruptcy clause of the Constitution, Article I, § 8, cl. 4, Congress abrogated state immunity for such a proceeding, thus avoiding a violation of the Eleventh Amendment. *Hood, supra,* p. 443. The Court did not reach the issue of Congressional abrogation, because it held that a Bankruptcy Court determination of dischargeability was an *in rem* proceeding, *id.* p. 447, and therefore was not "a suit against the state." *Id.* at 450.

The Tennessee Student Assistance Corporation contended that the proceeding to determine dischargeability established by Bankruptcy Rule 7001 *did* demonstrate that the dischargeability determination was a suit against the state, and that service of the summons constituted an infringement upon the sovereignty of the state. *Id.* at p. 452. This Court rejected that argument, by (1) holding that there was no statutory requirement for an adversary proceeding to determine dischargeability, let alone a constitutional dictate for doing so; (2) recognizing that dischargeability could be determined through use of the motion procedure which did not require service of a summons; and (3) holding that the possible use of a summons was irrelevant to the question of infringement upon a state's sovereignty, because an adversary proceeding was *not mandated,* either by constitution or by statute. *Id.* at 453-54. The Court was very clear. It said:

- "The text of [11 U.S.C.] § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion . . . which would raise no constitutional concern." *Id.* p. 453;

- "To conclude that the issuance of a summons, which is required only by the Rules, precludes Hood from exercising her statutory right to an undue hardship determination would give the Rules an impermissible effect. 28 U.S.C. § 2075 ('[The Bankruptcy Rules] shall not abridge, enlarge, or modify any substantive right')." *Id.* p. 454.

United and its supporting *amici curiae* argue that because United was not served with a summons and adversary complaint it was denied constitutionally-

guaranteed due process. They argue that although the Constitution does not expressly require use of the procedures found in rules or statutes, nonetheless because Espinosa did not use the "heightened procedures" called for by the Rules, and (it thought) by Congress, he did not comply with the due process clause. United Br. at. 54. This argument is simply incorrect. It conflicts with the basic proposition that neither Congress nor rules promulgated by this Court establish the due process guarantees of the Fifth Amendment

C. Notification by mail of the proposed plan and a hearing date to confirm it fulfilled *Mullane*'s requirement of "notice reasonably calculated under the circumstances."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) provides a very simple test of what notice must be given under the due process clause. The government must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. The Court has held that "mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988). Here, United received mail notice – as authorized by the Rule for giving notice of plan confirmation proceedings – of a *plan confirmation proceeding*.

United's quibbles about the address to which the notice was given is unavailing, not only because of the fact that it thereby obtained actual knowledge, but

because the mailing addresses used here, first by the Clerk in mailing the plan and notice, and then by the Trustee in mailing the follow up notice, were proper. *E.g. In Re King*, 290 B.R. 641, 645 (Bankr. C.D. Ill. 2003)("[A] notice of filing mailed to mortgagee's payment address is sufficient."); *In re Kleather*, 208 B.R. 406, 410 – 12 (Bankr. S.D. Ohio 1997)(forwarding notice to processing address as opposed to service address was sufficient for due process purposes); *DaShiell v. Ohio Citizens Bank*, 124 B.R. 242, 249 (Bankr. N.D. Ohio 1990)(service at post office box proper because debtor made his loan payments to the post office box.)

United ignores the fact that the required notice to be measured against the requirements of *Mullane* is that to give notice of a hearing to confirm a plan. The notice given for the plan confirmation hearing complied with Rule 2002(b), both in giving notice by mail and giving sufficient advance notice.

United argues that the importance of the subject of discharging a student loan constitutionally required the use of an adversary proceeding, and service of a summons. But *Hood* says that is not required, so the confirmation order was not void. Notwithstanding *Hood*, United wants this Court to hold that the amount of process that is due to confirm a plan depends upon the issues contained in the plan. To do so would create a brand new approach to procedural due process. It would establish a precedent of broad application and create pervasive uncertainty about the finality of confirmation orders.

United rests its argument that it is entitled to "heightened notice," upon all manner of statements

about the special nature of student loans, and the intent of Congress to restrict the dischargeability of student loans. It argues that, therefore, it is entitled to "enhanced due process" because of the importance of the interests involving discharge of student loans. Implicit in that argument is that the policy interests related to the discharge of student loans are more substantial or more important than the policy interests behind the non-dischargeability of other obligations enumerated in 11 U.S.C. 523(a). In part United presents this point by simply not attempting to distinguish the importance of the other non-dischargeable obligations from those behind 523(a)(8). There are numerous obligations specified in 11 U.S.C. 523(a) for which a debtor is denied a discharge. Each and every one of them has strong policy reasons prompting the denial of a discharge. United's argument that due process is offended when an adversary proceeding is not used to determine dischargeability only of student loans fails because student loans are not unique in implementing policies Congress found important. Indeed, if anything, the policy denying a discharge for student loans probably has less vigor than all the rest. To begin with, student loan discharges are the only obligations for which an exception can be made if denying a student loan discharge would impose an undue hardship upon the debtor. 11 U.S.C. 523(a)(8). In addition, Congress created the exception for student loans after most of the other exceptions were in effect; and even then it begun with significant limitations and then gradually expanded them. See the description of Congress's continuing amendments to the Code on the subject of student loans, Brief at 20 – 23; Brief of the United States at 23 -- 25.

Because there is really no basis to create a special "enhanced due process" rule solely for student loans based upon their supposed greater importance, logic would dictate that if a constitutional rule of "enhanced due process" is to be created, it should cover all other instances where strong policy reasons militate against discharge. But why should the "enhanced due process" rule be limited situations involving important policies related to discharges? There is no reason to give student loans special treatment and raise a higher due process barrier for them

If it was a violation of due process not to use an adversary proceeding in this case, then the logic of the rule sought by United would expose every plan granting a discharge that was confirmed, without an adversary proceeding, to a creditor motion that such a plan is void. A creditor could move under Rule 60(b)(4) to open up any such plan, no matter how long ago confirmed, and no matter how far into the future the creditor waits to bring its motion. This would put in jeopardy every single such Chapter 13 plan, not to mention Chapter 11 plans. Nor would this potential effect be limited to the discharge of student loans. *See In re Forrest*, 2009 Bankr. LEXIS 2732 (Bankr. N.D. Ill. 2009)(lien stripping).

D. That United must administer a large number of Chapter 13 cases is not one of those "circumstances" that define the process that is due.

United and its *amici* argue that the particular "circumstances" which this Court should consider in deciding whether *Mullane* was satisfied include several claimed to be unique to student lenders. It

claims these considerations justify what is a most astounding conclusion. Because of these "special considerations" United and its *amici* argue that a student loan creditor should be able to entirely ignore mailed notice – actually received – of a Chapter 13 plan (and presumably mailed notice under Chapter 7 or any other chapter of the Code as well.)[11] This Court should disagree.

United and its *amici* complain of their heavy burden in dealing with a flood of notices in Chapter Thirteen cases. Br. at 39. United argues that the high volume of mailed notice it receives justifies ignoring all of that mail except summonses for adversary proceedings. Espinosa can find no case involving due process under *Mullane* that considers, in its determination of what notice is "reasonable under the circumstances," any of the following, which United says justifies ignoring the mailed notice:

- how an organization deals with (or has problems dealing with) a given notice once received;

- how many pieces of mail a notice recipient may receive at the same time as the particular notice being challenged;

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[11] *E.g.* Brief of States at 32 (if rules say notice should come in a blue envelope, creditor need not open a white one); Brief of National Council of Higher Education Loan programs, Inc. at 33 (nothing in the Code or Rules imposes a duty upon a creditor holding non-dischargeable obligation to read a plan, and public policy suggests a student loan guaranty agency should not have to incur the expense to do so)

- how many notices for how many similar cases may be given;

- whether it is reasonable to allow the notice recipient to ignore the notice;

- whether notice was "unreasonable under the circumstances" because United should not be put to the burden of having to make "needless objections."

- whether the notice recipient would have to retain counsel to respond to the notice, Br. at 48; Brief of Educational Credit Mgmt. Corp. at 34, a problematic proposition, given that the Code expressly permits a creditor like United to use non-lawyer staff to present its position and claims at a first meeting of creditors, 11 U.S.C. 341(c) ; and

- whether the notice recipient's response would invariably be an objection, Br. at 48, 49 (i.e. notice should just be dispensed with based upon the likelihood of such unvarying objections).

None of the foregoing special circumstances argued by United is relevant to whether the notice was "reasonably calculated" to provide notice.

Mullane says that the reasonableness of notice is also measured by whether it is of a kind which would be chosen by one "desirous of actually giving notice." 339 U.S. 315. It is suggested that Espinosa's choice to give notice of a plan and its confirmation was not such

notice.[12] This is unpersuasive for three reasons. First, Espinosa did not choose the form of notice required for plan confirmation, the Bankruptcy Rules did. Second, given that Espinosa was proposing that United waive the need for a separate undue hardship hearing, Espinosa's use of the plan confirmation process was a reasonable alternative. Third, Espinosa furnished *four* different addresses, related to the student loans, to which notice should be given.

Even were United's "special considerations" germane to what notice is reasonable under the circumstances, its arguments about them are unpersuasive.

To begin with, while United and its amici make much of the "tidal wave of mail" they receive, they also furnish no facts, statistics or information about the pervasiveness of plans proposing waiver of undue hardship. Other than to add up the number of circuit and district court cases involving waiver of undue hardship – which would be a minuscule number compared to the entire volume of bankruptcy cases – there is no way of knowing whether this is a "problem" of any significance at all.[13] Curiously, United has never

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[12] Brief of Educational Credit Mgmt. Corp. at 14; Brief of National Council of Higher Education Loan Programs, Inc. at 39.

[13] It is entirely unclear that there is any significant abuse to be addressed. "[T]he National Bankruptcy Review Commission concluded that the anecdotal concerns about the abuse of the educational loan system are not supported by the empirical evidence. National Bank Rev. Comm'n, Bankruptcy: The Next Twenty Years § 1.4.5 (Oct. 20 1997) *cited in In re Hornsby*, 144

explained the circumstances surrounding its actions in this case. It received the notice. It filed a proof of claim. But it ignored the plan hearing and made no objection. If United's actions were a result of its problems with a "tidal wave of mail," one would think United would have said so. But the record is devoid of any such information. Similarly, while amici speak generally about their problems in identifying plans that propose waiver of undue hardship findings, they, too, fail to provide any data or statistics about plans "missed" because of the flood of mail. What really is happening here is that student loan creditors simply want the privilege of ignoring proper notice, accepting payments under a plan, then proceeding with collection as though no bankruptcy proceeding and plan had ever occurred. They want the proverbial privilege of "having their cake and eating it, too."

Next, United's protestation of difficulty in identifying plans with undue hardship waiver provisions not only suffers from the lack of factual support. It also ignores modern practice, which allows United to insure that efficient notice of proposed plans and confirmation hearings are directed to precisely the person or entity within the organization that should see such notices. A recent amendment of 11 U.S.C. 342, greatly streamlines the notice process. Section 342 outlines the manner of giving notice under various circumstances. As a result of a 2005 amendment to section 342, United may now identify for all bankruptcy courts the name of a "person, or an organizational subdivision of such creditor to be

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F.3d 433 (6th Cir. 1998)" Collier on Bankruptcy (Alan N. Resnick & Henry J. Sommer, eds., 15th ed.) ¶ 523.14[1] & [2] fn. 1b.

responsible for receiving notices." 11 U.S.C. 342(g)(1). A creditor like United "may file with *any* Bankruptcy Court a notice of address to be used by *all* the Bankruptcy Courts . . . " (emphasis supplied.) 11 U.S.C. 342(f)(1). This very simple and efficient procedure for establishing reliable and prompt notice does two things.

First, it obviates any genuine concern that notice given to a payment address – although acceptable – may not find its way to the proper person (although in this case, it obviously did). Further, using this notice procedure should alleviate concerns expressed by United and *amici* that they are prejudiced in responding to notices in a Chapter 13 case, if presented with the shortest time limits for the various steps in a Chapter 13 case.[14] Such concerns are unrealistic in light of current modes of rapid electronic notice. Moreover, they are not relevant to whether the particular notice satisfied *Mullane*.

Finally, United's contention that it should be excused from having to "open the envelope," because it would have no other reason to do so, ignores the requirements imposed upon student loan lenders and guaranty entities by Department of Education regulations.

The regulations impose obligations upon lenders, and guaranty agencies like United, when a student borrower files bankruptcy proceedings. These include:

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[14] Brief of United Stats at 26, 27; Brief of Educational Credit Mgmt. Corp. at 3; Brief of National Council of Higher Education Loan Programs, Inc. at 3, 10 – 11, 17 – 19.

- For a lender to file a claim with a guaranty agency for payment of the loan the lender must "determine that a borrower has filed a petition . . . on the basis of receiving a notice of the first meeting of creditors or other proof of filing provided by the debtor's attorney or the bankruptcy court." 34 CFR 682.402(f)(3).

- A lender's claim must include "a statement of any facts of which the lender is aware that may form the basis for an objection or exception to the discharge of the borrower's loan obligation in bankruptcy and all documents supporting those facts." 34 CFR 682.406(g)(1)(v)(B).

- The required guaranty agency participation in bankruptcy proceedings includes consideration of undue hardship. The guaranty agency must "determine whether repayment under either the current repayment or any adjusted repayment schedule authorized under this part would impose an undue hardship on the borrower and his or her dependents." 34 CFR 682.406(i)(1)(ii).

- If the guaranty agency determines that repayment would not impose an undue hardship, it "must then determine whether the expected costs of opposing the discharge petition would exceed one-third of the total amount owed on the loan, including principal, interest, late charges, and collection costs [in which event] it may, but is not required to engage in the activities described paragraph (i)(1)(iv)." 34 CFR 682.406(i)(1)(iii).

- Finally, the obligation of the Department of Education to make a reinsurance payment upon a student loan is conditioned upon the exercise of due diligence of the lender or guaranty agency in attempting to collect the loan. 34 CFR 682.406(a)(3),(11). Surely failing to object to a plan proposing waiver of undue hardship would be a failure of due diligence, unless of course it was a considered decision for reasons already discussed.

Given these obligations, a guaranty agency like United cannot ignore an envelope from the bankruptcy clerk containing notice of a filing, a plan, and hearing dates. It is unreasonable to conclude that it really would. But in any event, these considerations really have nothing to do with whether the notice given here was "reasonable under the circumstances."

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Steven L. Thomas, *Do the Federal Rules of Bankruptcy Procedure Define Procedural Due Process Rights in Bankruptcy?*, 9 Norton Bankr. L. Adviser 2 (2009) 24

INTRODUCTION

Congress has mandated a tripartite ordering of debts that may be dischargeable in bankruptcy. Debts in the first category – ordinary debts – are fully dischargeable. 11 U.S.C. § 1328(a). Debts in the second category – those for credit fraud, fraud or defalcation while acting as a fiduciary, embezzlement, or larceny – are dischargeable *unless* the creditor objects. 11 U.S.C. § 523(c). And debts in the third category – student loans, certain taxes and customs duties, drunk-driving death or personal injury liabilities, criminal fines and restitution, and alimony and child support, – are excepted from discharge, *even if* the creditor does not object. 11 U.S.C. §§ 523(a) and 1328(a)(2) and (3).

Student loan debts fall into the third statutory category, and are not dischargeable unless the court finds undue hardship through an adversary proceeding after appropriate notice. 11 U.S.C. § 102(1)(A); FED. R. BANKR. P. 7001, 7004(a)-(b). The effect of the Ninth Circuit rule is to transform debts in the third category into debts in the second category – to make all enumerated debts fully dischargeable *unless* the creditor objects. That outcome cannot be reconciled with the statutes.

Congress has directed that the exception is self executing: the statutory language provides that, absent a finding of undue hardship, a bankruptcy discharge "*does not discharge* an individual debtor for any debt" for student loans. 11 U.S.C. § 523(a)(8)

(emphasis added). That congressional language is addressed not only to the bankruptcy court, but to the legal *effect* of the order; it mandates that, as a matter of law, a noncompliant discharge "does not discharge" student loan debts.

Safeguarding against what the Ninth Circuit has allowed here, Congress has also prohibited debtors from including provisions in Chapter 13 plans that are inconsistent with the Bankruptcy Code. 11 U.S.C. § 1322(b)(11). Moreover, Congress has withheld authority from the bankruptcy courts to confirm plans that do not comply with the Code or to discharge debts that fall into the above-described third category even though specifically "*provided for by the plan*." 11 U.S.C. § 1325(a)(1); 11 U.S.C. § 1328(a)(2) (emphasis added).

Espinosa argues, contrary to the text of the statutes, that his noncompliant order in fact *did discharge* his student loan debt. That argument cannot be squared with the text, purpose and structure of the Code.

Espinosa's principal arguments sound in waiver. And yet a party cannot waive, by failing to object, a statutory right for which Congress has provided that no objection is necessary to preserve. Nor can a party waive a statutory prohibition on the legal effect of an order.

For those reasons, *res judicata* does not bar consideration of the Rule 60(b) motion. The instant case is not a collateral attack on a final judgment. It

is a direct motion to set aside a judgment that was void *ab initio* under the Code.

Were it otherwise, the necessary result would be to open the door to "discharge by declaration" for every category of excepted debt. Given the possibility of getting those debts discharged unawares, debtors' counsel would be obliged to routinely attempt to do so. And that, in turn, would necessitate thousands and thousands of *pro forma* objections by creditors otherwise protected by statute, and every one of those objections would then be upheld – returning to the *status quo ante* after an enormous waste of time and resources. To this nonsensical result, Espinosa has no response. That silence is revealing.

As the federal, state, and municipal *amici* in this case have powerfully underscored, no good purpose is served by requiring thousands of creditors to file boilerplate objections, and spend considerable resources, just to preserve the current statutory exceptions. No practical benefit would arise. Such a regime would disserve creditors, disserve the judicial system, and even disserve debtors, who would simply face delay and added expense through pointless procedure.

Far better it would be to enforce the statutory text as written, discourage litigation gamesmanship, and preserve the exceptions to discharge that Congress has mandated.

ARGUMENT

I. THE BANKRUPTCY COURT LACKED AUTHORITY TO CONFIRM A PLAN THAT PURPORTS TO DISCHARGE STUDENT LOAN DEBT WITHOUT A FINDING OF UNDUE HARDSHIP.

Initially, Espinosa seeks to avoid the ultimate issue by contending that "[u]nless and until" USA Funds "can prevail in setting aside the judgment," USA Funds' "merit-based arguments are irrelevant." Br. at 18. Not so. An inquiry into the merits of a void order is inescapable where, as here, the denial of a Rule 60(b) motion is under review. See *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999, 1003 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) (inquiry into merits of arguably void order is unavoidable on appeal of denial of Rule 60(b) motion) (cited with approval in *Browder* v. *Director, Dept. of Corr.*, 434 U.S. 257, n.7 (1978)).

Here, the district court reversed the bankruptcy court's denial of USA Funds' Rule 60(b)(4) motion and granted relief, ruling that the confirmation order is void. Dist. Dkt. 11. Espinosa appealed that order, Dist. Dkt. 12, and the Ninth Circuit's reversal is now before this Court. Given USA Funds' contention that the confirmation order is void (to the extent of noncompliance with the Code), review of those prior

rulings and the merits of the underlying order is logically inseparable and properly before the Court.[1]

A. An Unlawful Confirmation Order Is Void, Not Merely Erroneous.

An order is void if the court, although having jurisdiction over the parties and the subject matter, nonetheless enters a decree "not within the powers granted to it by the law." *United States ex rel. Wilson*

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[1] Espinosa's *amici*, but not Espinosa, argue that the Court lacks subject-matter jurisdiction because USA Funds' Rule 60(b)(4) motion was not filed within the 180-day time limit set out in 11 U.S.C. § 1330(a). That argument is meritless. A time limit is not "jurisdictional" merely because it is prescribed by statute. Statutes are only jurisdictional if Congress says so. "[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 516 (2006). That is the case here. Congress put no express jurisdictional designation on the time limit of section 1330(a). Instead, it set out a rule for revoking an order in an action over which the court already has jurisdiction. In that respect, section 1330(a) closely parallels the claim-processing rules held not to be jurisdictional in *Eberhart* v. *United States*, 546 U.S. 12 (2005), and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004). As the Court explained in *Kontrick*, "a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, * * * can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." 540 U.S. at 456. That is precisely what happened here. Espinosa did not invoke section 1330(a) in the bankruptcy court, so that defense was forfeited long ago – and not even Espinosa seeks to resuscitate it now. The time limitation in section 1330(a) is not jurisdictional, and therefore does not bar the Court's review of the orders here.

v. *Walker*, 109 U.S. 258, 266 (1883). Accord *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353-54 (1920); *Wilcox* v. *Jackson*, 38 U.S. 498, 511 (1839). Not surprisingly, Espinosa fails in his attempt to distinguish almost 200 years of precedent so holding.

In *United States ex. rel. Wilson* v. *Walker*, *supra*, the order directing the estate administrator to turn over monies that were not assets of the estate was held beyond the authority granted by the relevant statute – and therefore void. Similarly, the provision of the confirmation order here purporting to discharge a student loan debt without a finding of undue hardship is not authorized by the Code and is likewise void. 11 U.S.C. §§ 523(a)(8) and 1328(a)(2). Indeed, the bankruptcy court had no statutory authority to confirm a plan that was not in compliance with the Code. 11 U.S.C. § 1325(a)(1). For that reason, the bankruptcy court's confirmation of the plan providing for the discharge was not merely error in the *exercise* of authority, as Espinosa's *amicus* Trustees' Association argues. Br. at 27. It was done *without* authority – and was therefore void, just like the order in *Wilson*.

In *Vallely*, *supra*, the order resulting from the adjudication of an insurance company's bankruptcy was similarly beyond the court's authority – and thus void – because the pertinent statutes specifically excepted insurance companies from the benefits of bankruptcy. Espinosa attempts to distinguish *Vallely* by characterizing it as a personal jurisdiction case, but the case had nothing to do with personal

jurisdiction. As in *Vallely*, the statutes at issue here restrict the power of the bankruptcy court to act – in this case, to confirm a plan providing for discharge of student loan debt without a determination of undue hardship. That provision of the confirmation order is void, just like the order in *Vallely*.

Espinosa likewise fails to distinguish *Wilcox* v. *Jackson*, *supra*, which states the same rule as *Vallely* and the case on which they both rely, *Elliott* v. *Peirsol*, 26 U.S. 328 (1828). Indeed, his description of *Wilcox* makes USA Funds' point that unauthorized judicial acts are void. Br. at 28.

B. *Travelers* Does Not Bar USA Funds' Direct Attack On The Confirmation Order.

Espinosa does not dispute that USA Funds' Rule 60(b)(4) motion was a direct attack on the confirmation order that is not barred by *res judicata*. Espinosa's *amicus* goes further and *agrees* it is a direct attack. Br. of *Amicus* Pardo at 16, n.10. Nonetheless, Espinosa relies upon *Travelers Indem. Co.* v. *Bailey*, 129 S. Ct. 2195 (2009), which involved a *collateral* attack on an order for lack of subject matter jurisdiction, to argue that USA Funds' attack on the order is likewise barred. Espinosa is mistaken.

Travelers arose out of the Chapter 11 bankruptcy of asbestos manufacturer Johns-Manville Corporation in 1982. The bankruptcy court devised a reorganization plan involving a trust to be funded mostly by Manville's insurers, including Travelers. Essential to

the plan was the settlement of litigation between Manville and its insurers. Accordingly, the resulting settlement order enjoined all claims against the insurers "arising out of or related to" the policies, and released the insurers from such claims. That order, in turn, was incorporated in the 1986 orders confirming the plan of reorganization. Those orders were affirmed on appeal.

Years later, personal-injury plaintiffs filed suits in state courts against Travelers alleging various state-law claims based on the insurer's own misconduct. Invoking the 1986 orders, Travelers moved to enjoin the suits. The bankruptcy court ultimately approved a settlement between Travelers and some of the plaintiffs, held that the claims were barred by the 1986 orders, and entered an order clarifying the effect of those orders.

On appeal, the Second Circuit held that the bankruptcy court lacked subject matter jurisdiction to enjoin the claims against Travelers. This Court reversed, holding that the 1986 orders became final on direct review 20 years earlier, whether or not they were proper exercises of the bankruptcy court's jurisdiction. In reaching that conclusion, this Court rejected what it repeatedly characterized as a collateral attack on the 1986 orders. See, e.g., *id.* at 2206 ("The willingness of the Court of Appeals to entertain this sort of collateral attack cannot be squared with *res judicata* and the practical necessity served by that

rule."); *ibid.*, n.7 ("[T]his argument is an impermissible collateral attack.").

Unlike the collateral attack in *Travelers*, USA Funds' challenge here is a *direct* attack on the order – brought on the ground that the order's discharge of student loan debt is void. As Espinosa's *amicus* agrees, and he himself does not dispute, that challenge is a direct attack not barred by *res judicata*. See *Pepper* v. *Linton*, 308 U.S. 295, 302 (1939) (holding that *res judicata* did not prevent the court from "examining into the * * * judgment and disallowing or subordinating it as a claim" where the underlying judgment was claimed to be *void ab initio*). What is more, there was no issue in *Travelers* of any statutory limit on the court's power, as there is here. *Travelers* is therefore not apposite, much less dispositive.[2]

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[2] Like *Travelers*, this Court's decisions in *Celotex Corp.* v. *Edwards*, 514 U.S. 300 (1995), *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940), and *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938), are collateral attack cases and thus inapplicable. *Amicus* Trustees' reliance on *Bell* v. *Eastman Kodak Co.*, 214 F.3d 798 (7th Cir. 2000), is similarly misplaced. See Trustees' Br. at 10-11. The movant in *Bell* "tried to use [the motion] to appeal a final judgment entered by one magistrate judge to another magistrate judge, rather than to the court of appeals." 214 F.2d at 800. Hence, it was characterized as a collateral attack. In contrast, USA Funds' Rule 60(b) motion was a direct attack on a void provision in a confirmation order.

II. THE UNDUE HARDSHIP REQUIREMENT IMPOSED BY CONGRESS IS SELF-EXECUTING, AND CREDITORS THEREFORE HAVE NO DUTY TO OBJECT TO AN UNLAWFUL PLAN PROVISION DECLARING A DISCHARGE OF THE NONDISCHARGEABLE DEBT.

The exception of student loans from discharge in bankruptcy is "self-executing" – that is, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 450 (2004). Accordingly, a creditor has no duty to object to an illegal plan provision declaring a discharge of the nondischargeable debt. Instead, the creditor may wait for the debtor to initiate the adversary proceeding required by the Bankruptcy Rules to secure an undue hardship determination as required by the Code.

Any attempt to discharge a student loan without a finding of undue hardship would not comply with section 523(a)(8). And compliance with the Code is a mandatory condition to confirmation of a plan. Therefore, a court cannot confirm a noncompliant plan even if no creditor objects to it. Absent a duty to object, the failure to do so cannot constitute a waiver of the express requirements of the Code and Rules. Espinosa and his *amici* raise a variety of challenges to that conclusion, but all lack merit.

A. It Is Immaterial To The Bankruptcy Court's Duty That The Determination Of Undue Hardship Required By Congress Is Not "Jurisdictional."

By statute, bankruptcy courts have an "independent duty to confirm only those Chapter 13 plans which comply with all the provisions of Chapter 13 (see 11 U.S.C. § 1325(a)(1))." *In re Fizer*, 1 B.R. 400, 402 (Bankr. S.D. Ohio 1979). Nonetheless, Espinosa's *amici* Professors argue that sections 523(a)(8) and 1328(a)(2) are not "jurisdictional" and thus need not be addressed *sua sponte* by bankruptcy courts. Br. at 12-14. That argument misses the larger point that by express statutory restriction, *only* plans that comply with the Code may be approved. Pet. Br. at 33-36. Any other result would be at odds with the text, purpose, and structure of the Code. *Id.* at 16-24.

In all events, this Court has consistently recognized that even though non-jurisdictional requirements may be subject to waiver, forfeiture, and equitable exceptions, see, e.g., *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), some requirements should be enforced more rigidly, *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 23, 31 (1989), and therefore can be raised by the court on its own motion. *Day* v. *McDonough*, 547 U.S. 198, 205, 209 (2006). In making those determinations, the Court has focused on the relevant statutory language, other indicia of congressional intent, and the extent to which the requirements protect institutional or public interests beyond the interests of the parties to the

litigation. *Id.* at 205-206; *Hallstrom*, 493 U.S. at 28-29.

The last consideration – whether the rule serves broader systemic interests beyond the litigants' interests – is key. *Hallstrom*, 493 U.S. at 24-26, 28-29; *Day*, 547 U.S. at 205, 209. The statutes at issue here easily fit into that category. By making student loan debt presumptively nondischargeable, Congress sought to preserve the viability of educational loan programs and protect the public fisc. *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, pt. I at 11, 170, 176-77; pt. II § 4-506(8) & note (1973). Similar interests are reflected in the public policy reasons animating the other exceptions to discharge. Pet. Br. at 46-47. In light of those considerations, bankruptcy courts should strictly enforce the undue hardship requirement and refuse to confirm a debtor's proposed plan to the extent it fails to comply with the Code by proposing the discharge of a student loan debt without a determination of undue hardship – even if the creditor has not objected.

That conclusion comports with this Court's holdings – in a variety of contexts – that where, as here, a rule or defense implicates extra-party interests, judicial enforcement of that rule is particularly appropriate. See, e.g., *Day*, 547 U.S. at 205-206, 209 (holding that because the habeas statute of limitations "implicate[d] values beyond the concerns of the parties," the court had discretion to raise the defense *sua sponte*) (citation omitted); *Arizona* v.

California, 530 U.S. 392, 412-13 (2000) (holding that because the *res judicata* defense "is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste," a court "may dismiss the action *sua sponte*" on this ground); see also *United States* v. *Mitchell*, 518 F.3d 740, 749-751 (10th Cir. 2008) (same as to the time limitation in Federal Rule of Appellate Procedure 4(b)).

Congress has imposed a *duty* upon bankruptcy courts to confirm only those Chapter 13 plans that comply with the Code. See 11 U.S.C. § 1325(a)(1).[3] "To qualify for confirmation under Chapter 13, [a] plan ha[s] to satisfy the requirements set forth in § 1325(a) of the Code." *Associates Commercial Corp.* v. *Rash*, 520 U.S. 953, 956 (1997). That duty requires courts to enforce the undue hardship requirement whether or not a creditor lodges an objection to a noncompliant – and thus unlawful – plan.

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[3] Congress has explicitly provided that bankruptcy courts may lodge *sua sponte* objections to enforce their own rules or prevent an abuse of process. 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.").

B. Even If Waiver Were Possible, No Waiver May Be Inferred Here.

Student loan debt is presumptively nondischargeable, the statutory exception from discharge is "self-executing," and "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." *Hood*, 541 U.S. at 450. A creditor therefore need not take any action to avoid a discharge. *In re Mansaray-Ruffin*, 530 F.3d 230, 236 (3d Cir. 2008) (discussed at Pet. Br. at 34). Under those circumstances, there can be no waiver of an objection where there is no duty to object in the first place.

That conclusion is confirmed by one of the cases upon which Espinosa relies. In *Taylor* v. *Freeland & Kronz*, 503 U.S. 638 (1992), the bankruptcy trustee failed to object to the debtor's list of exempt property. Section 522(*l*) of the Code requires the debtor to submit a list of the property that is claimed to be exempt from the claims of creditors, and by placing the burden to object on creditors, makes any listed property exempt absent an objection:

> The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section * * * * Unless a party in interest objects, the property claimed as exempt on such list is exempt.

A creditor who does not object therefore waives any objection to the claimed property exemptions. But unlike section 522(*l*), the statutes governing the

discharge of student loan debts place the burden on the *debtor* to take affirmative action to obtain a determination of undue hardship.

In that respect, section 522(*l*) operates more like section 523(c)(1), which provides that certain categories of debts that are not automatically excepted from discharge will be discharged unless the creditor seeks a determination of dischargeability.[4] Under section 523(c)(1), a creditor who fails to initiate an adversary proceeding to avoid the discharge of such a debt waives the right to prevent the discharge. That is not true as to student loan debt. See Br. of *Amicus* United States at 13-16. As the Seventh Circuit has explained in rejecting the argument Espinosa makes here, "[s]tudent loan creditors justifiably rely on the explicit notice provisions of the Code and Rules and have no reason to act until the service of a summons for an adversary proceeding apprises them that their property rights may be affected." *In re Hanson*, 397 F.3d 482, 486-87 (7th Cir. 2005).

Espinosa relies upon *Vallely* v. *Northern Fire & Marine Ins. Co.*, *supra*, but that case actually supports the proposition that there can be no waiver here. In *Vallely*, the creditors of an insurance company initiated bankruptcy proceedings against it.

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[4] In Chapter 13 cases, those categories of debts include credit fraud, fraud or defalcation while acting as a fiduciary, embezzlement, and larceny. 11 U.S.C. §§ 523(a)(2) and (4), 1328(a)(2).

Although the insurance company *knew* of the pending bankruptcy and its officers even assisted the trustee without questioning the propriety of the bankruptcy, the company was not estopped from later moving to vacate the adjudication as void. Likewise, USA Funds' knowledge of Espinosa's bankruptcy, and even of the proposed plan, does not support any inference of a waiver.

Nor can waiver be inferred based upon assumptions such as those made by the Ninth Circuit regarding what creditors think when reviewing a student loan debtor's schedules and plan. See Pet. App. 9-10. As a practical matter, there is simply too little information in the schedules and plan for the debtor to prove, or for the creditor to analyze, the rigorous elements of undue hardship – much less to support an inference that the creditor must have decided to waive any objection because it would be futile. Pet. Br. at 34-36.

C. The Then-Existing Regulations Did Not Require USA Funds To Review Or Object To Espinosa's Plan.

Espinosa and his *amici* Professors argue that federal regulations required USA Funds to review Espinosa's Chapter 13 plan for compliance with the Code. Respondent's Br. at 51-53; Professors' Br. at 19-21. That is incorrect. The cited regulations were not in effect until July 1, 2008 – long after Espinosa filed bankruptcy in 1992. The regulations that *were* in

effect when Espinosa filed bankruptcy did not require creditors like USA Funds to review plans for compliance with the Code. Instead, they only required a creditor, after receiving notice of the commencement of the bankruptcy, to file a proof of claim and inquire whether the debtor had filed a petition to have the student loan declared dischargeable "on grounds of undue hardship." 34 C.F.R. § 682.402(d). If so, the lender was required to file a claim with the guaranty agency, which was to contest the hardship discharge. 34 C.F.R. § 682.402(d) and (h). The regulations therefore explicitly contemplated that student loan debtors would follow proper procedure by filing an adversary proceeding.[5]

Although the new regulations do require guaranty agencies to review proposed Chapter 13 plans and to object if the plan does not meet the

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[5] Under the current regulations, which are misquoted out of context by Espinosa, the lender must, after receiving formal notice of the bankruptcy filing, 34 C.F.R. § 682.402(f)(3), file a proof of claim in the bankruptcy, 34 C.F.R. § 682.402(f)(4), and a claim with the guaranty agency. 34 C.F.R. § 682.402(f)(5). The lender is to provide to the guaranty agency any known information that might support an objection to the discharge. 34 C.F.R. § 682.402(g)(1)(v)(B). *Only* in the event of an undue hardship claim must the guaranty agency make its own assessment of undue hardship and a cost-benefit analysis of opposing the adversary proceeding discharge petition. 34 C.F.R. § 682.402(i)(1)(ii) and (iii). As before, the new regulations still explicitly contemplate that the debtor will follow proper discharge procedure by affirmatively seeking a hardship determination. See 34 C.F.R. § 682.402(f)(5)(i)(C) and 34 C.F.R. § 682.402(i)(1).

requirements of 11 U.S.C. § 1325, 34 C.F.R. § 682.402(i)(2), no waiver should be presumed from the lack of an objection because, as detailed by *amicus* National Council of Higher Education Loan Programs, the confirmation process often proceeds at a pace that prevents a timely objection. NCHELP Br. at 16-28. Even under the current regulations, because the statutory requirement of an undue hardship determination is self-executing, a court cannot confirm a noncompliant plan even if no creditor objects to it. 11 U.S.C. § 1325(a)(1).

III. ESPINOSA'S CONFIRMATION AND DISCHARGE ORDERS, ENTERED WITH NO DETERMINATION OF UNDUE HARDSHIP, ARE NOT FINAL AS TO USA FUNDS.

Espinosa ignores the discharge statute, 11 U.S.C. § 1328(a), which provides that after completion of the plan, the court shall grant the debtor a discharge "of all debts provided for by the plan * * * *except* any debt – * * * (2) of the kind specified in * * * section 523(a)[(8)] * * * " (Emphasis added). Thus, even a student loan debt "provided for" by a plan, such as Espinosa's debt, continues to be excepted from discharge.

Espinosa makes no effort to harmonize the specific exceptions to discharge enumerated in section 1328(a) with the more general language of section 1327(a), which describes the effect of confirmation. Nor does he dispute that the specific controls the general, that the two sections must be read to give

meaning to all of their terms, and that "[g]iving preclusive effect to a discharge-by-declaration through § 1327(a) renders part of § 1328(a)(2) nugatory." *Educational Credit Mgm't Corp.* v. *Mersmann (In re Mersmann)*, 505 F.3d 1033, 1048 (10th Cir. 2007).

Indeed, Espinosa does not challenge that there was *no* adjudication of the undue hardship issue on the merits prior to confirmation or discharge. He therefore effectively concedes that a discharge by declaration is not an adjudication on the merits. Thus, the confirmation and discharge orders do not have *res judicata* effect. Consequently, *res judicata* cases such as *Travelers* and *Chicot County Drainage Dist.* v. *Baxter State Bank*, *supra*, are inapposite.

The suggestion of Espinosa's *amici* that the issue of undue hardship might have been adjudicated when USA Funds filed a proof of claim is without merit. See Trustees' Br. at 10, n.4. The Trustees ignore that neither Espinosa nor his trustee objected to the claim. That lack of objection cannot be squared with a contention that a portion of the claim was discharged by some implicit adjudication of undue hardship. Furthermore, the Trustees' mention of the rule that a default judgment has *res judicata* effect is irrelevant because Espinosa did not commence an adversary proceeding as required, and USA Funds did not default.

Espinosa's argument that the amended discharge order is final is illusory. That order is, of course, dependent upon the underlying confirmation order.

Because the confirmation order is partially void, the subsequent discharge order is too, and subject to a Rule 60(b)(4) motion for that reason. An appeal from that discharge order challenging whether there was clerical error would have been pointless, as it would not reach the determinative issues that were already on appeal.

Espinosa's *amici* suggest that sanctioning attorneys would be preferable to vacating void orders. Trustees' Br. at 30-31 (citing *Taylor* v. *Freeland & Kronz*, 503 U.S. 638 (1992)). But that will not stop the practice of including unlawful provisions for the discharge of nondischargeable debts in Chapter 13 plans. Indeed, the Ninth Circuit disapproved one bankruptcy court's threat of sanctions for doing so. Pet. App. 25-26. Moreover, if the Ninth Circuit's decision in this case is affirmed, the practice will be "warranted by existing law" and therefore (unlike in *Taylor*) will not be sanctionable. FED. R. BANKR. P. 9011(b) and (c).

IV. AFFIRMING THE NINTH CIRCUIT WILL OPEN THE FLOODGATES TO DISCHARGE OF OTHER NONDISCHARGEABLE DEBTS BY MERE DECLARATION, CONTRAVENE PUBLIC POLICY, AND CAUSE SENSELESS WASTE.

Neither Espinosa nor his *amici* offer any response to the arguments of USA Funds (at Pet. Br. 43-51) and its *amici* concerning the important interests served by Congress' requirement of an adversary

proceeding to establish undue hardship before student loan debt may be discharged. They do not address the inevitable spread of discharge by declaration to other types of nondischargeable debts if the Ninth Circuit's decision is affirmed. And they do not deny that senseless waste will result if the burden to object to attempted discharges by declaration is imposed upon creditors.[6]

That silence is telling. If student loan debt discharge by declaration is approved, the tactic of discharge by declaration will no doubt spread in Chapter 13 cases to other nondischargeable debts, such as taxes, domestic support obligations, drunk driving personal injury and death liabilities, and criminal fines and restitution. Br. of *Amici* States at

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[6] With regard to the burden on creditors, Espinosa could not be more wrong in his suggestion that a corporate creditor can object *pro se* to a plan at the first meeting of creditors. Br. at 48. An objection to confirmation is beyond the scope of a creditor's meeting. See 11 U.S.C. § 341; FED. R. BANKR. P. 2003. "The chief function of the meeting of creditors is to provide the machinery for creditors to elect a trustee, examine the debtor and be heard generally in an advisory capacity on questions concerning the administration of the estate." 3 COLLIER'S ¶ 341.01, p. 341-4. Furthermore, the meeting is extra-judicial rather than a hearing. The trustee presides at the meeting and the court is expressly prohibited from presiding or attending. 11 U.S.C. § 341(a) and (c). Finally, an objection to confirmation must be filed as a "contested matter," FED. R. BANKR. P. 3015(f) and 9014, and a corporate creditor can only do so through counsel. *Rowland* v. *California Men's Colony*, 506 U.S. 194 (1993); FED. R. BANKR. P. 9010, 1983 Advisory Committee Note; 10 COLLIER'S ¶ 9010.07, p. 9010-5.

1-2; Pet. Br. at 43-45. That only underscores the absurdity of reading section 1327(a) in isolation to give finality to a confirmation order that illegally discharges a nondischargeable debt in defiance of numerous other Code provisions. On that view, a father could propose a Chapter 13 plan containing a provision declaring the discharge of his child support arrearages, mail it to the mother, and if she does not object, the plan will be confirmed and become forever final and immune even to a direct attack by a Rule 60(b)(4) motion.

There is no question that finality is an important policy. But other concerns are implicated here, as well. That is why, when deciding whether a particular aspect of a confirmation or discharge order is deserving of finality, it is essential to consider the nature of the debt discharged. In that regard, it is decisive that "[t]he statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts – such as child support, alimony, and certain unpaid educational loans and taxes, as well as liabilities for fraud." *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991). Because "Congress evidently concluded that creditors' interests in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start," *ibid.*, it necessarily follows that Congress did not intend to give finality to the discharge of a student loan debt without a finding of undue hardship, or to give finality to the discharge of a nondischargeable debt

(e.g., child support) that the court had no authority to discharge in the first instance.

The consequences of a contrary holding are serious and far reaching. That is particularly true with respect to municipalities already dealing with stretched budgets and shortfalls. See Br. of *Amicus* Int'l Municipal Lawyers at 3-4. Because tax obligations are always nondischargeable if they fall within 11 U.S.C. § 523(a)(1), many small municipalities do not expend scarce resources retaining bankruptcy counsel for Chapter 13 proceedings, in reliance on the rule that plans containing impermissible provisions affecting nondischargeable tax obligations will be deemed void. *Ibid.* But if Espinosa prevails, that presumption will fall by the wayside, and municipalities must either expend scarce resources objecting to facially deficient Chapter 13 plans, or risk losing valuable tax revenue. *Id.* Such untoward results, and others like them, Pet. Br. 43-45, are entirely unnecessary and easily avoided by adhering to the existing framework that plans may not be confirmed if inconsistent with the Code and Rules.

V. CONGRESS HAS PRESCRIBED THE LEVEL OF NOTICE DUE TO USA FUNDS, WHICH ESPINOSA FAILED TO PROVIDE.

Discharge by declaration is not only inconsistent with the Code, it is also contrary to the constitutional safeguard of due process. In arguing to the contrary, Espinosa simply misapprehends USA Funds' due

process argument. There is no question that Congress could have allowed discharge of student loans with lesser procedural protections. But once Congress specified heightened procedural protections, the Constitution prohibits depriving persons of property without the process that is due. Congress specified the process that was due – here, a judicial determination of "undue hardship," within the context of the adversary proceeding required by the Rules.[7] Congress also specified the level of notice due – "such notice as is appropriate in the *particular* circumstances." 11 U.S.C. § 102(1)(A) (emphasis added). Discharging a student loan debt with any less process and notice runs afoul of the protections of due process.

The adversary proceeding is prescribed by the Bankruptcy Rules, which in turn are promulgated by this Court under 28 U.S.C. § 2075. An adversary proceeding is commenced by the filing of a complaint, FED. R. BANKR. P. 7003 (incorporating FED. R. CIV. P. 3), that must be served with a summons. FED. R. BANKR. P. 7004. Service upon a corporation, such as USA Funds, must be made upon "an officer, a managing or general agent, or to any agent authorized by appointment or by law to receive service of process." FED. R. BANKR. P. 7004(b)(3). An adversary proceeding thus requires a "heightened degree of

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[7] Steven L. Thomas, *Do the Federal Rules of Bankruptcy Procedure Define Procedural Due Process Rights in Bankruptcy?*, 9 Norton Bankr. L. Adviser 2 (2009).

notice." *Banks* v. *Sallie Mae Servicing Corp.* (*In re Banks*), 299 F.3d 296, 303, n.4 (4th Cir. 2002).

In contrast, notice of the confirmation hearing of a Chapter 13 plan need only include a summary of the plan, not the actual plan. FED. R. BANKR. P. 3015(d). And notice need only be sent by mail to creditors at the addresses provided by the debtor on his or her list of creditors. FED. R. BANKR. P. 2002(g)(2). Notice of a proposed plan thus does not require specific notice of the effect of the plan on each creditor, and it does not require notice to be served on a person at any particular level of responsibility. The notice requirements to initiate an adversary proceeding are thus far more exacting than the notice required for confirmation of a Chapter 13 plan. *Hood*, 541 U.S. at 451-52.

Because Congress has said that the level of notice given must be such "as is appropriate in the particular circumstances," the objective of the proceeding must be one of the circumstances considered when judging the sufficiency of the notice given. When the discharge of a student loan debt is the objective, the level of notice required is the same whether the debtor attempts to declare a discharge in a proposed plan, or proceeds by motion (if that were possible) or through an adversary proceeding. The level of notice required by section 102(1)(A) is guided by the Rules. 2 COLLIER'S ¶ 102.02[1], p. 102-4. Therefore, the notice appropriate to obtain a discharge of a student loan debt is service of a summons and complaint on a corporate officer or

authorized agent. FED. R. BANKR. P. 7003-7004. Where discharge of a student loan is the objective of a proposed plan, giving only the level of notice required to confirm a plan that does not seek that objective is insufficient.

Respondent's plan – which made no mention of undue hardship or its requisite elements and thus was not even the "functional equivalent" of a complaint – was merely mailed to petitioner at the post office box address at which it received loan payments. Although petitioner received such minimal notice of petitioner's plan, it was not given the notice and opportunity to be heard that Congress has prescribed to be due.

Contrary to Espinosa's characterization of it, USA Funds' argument is not that if Congress chose to allow discharge by declaration, the Constitution would forbid it. But that is not what Congress has done. Rather, the Code and Rules establish heightened procedural protections for the discharge of student loan debts, and due process requires that those protections be given full force. *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953). Espinosa's failure to satisfy the heightened notice standard deprived USA Funds of the notice deemed appropriate by Congress and the Rules and constitutes a denial of due process. "[W]hen notice is a person's due, process which is a

mere gesture is not due process." *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 315 (1950).[8]

That USA Funds had knowledge of Espinosa's bankruptcy and received his proposed plan containing the discharge by declaration provision is immaterial. As this Court has explained, "even creditors who have knowledge of a reorganization have a *right* to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." *City of New York*, 344 U.S. at 297 (emphasis added). Absent such notice, the unauthorized discharge provision of the resulting confirmation order is void.

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[8] USA Funds' *amicus* National Council of Higher Education Loan Programs, Inc. well describes in practical terms how student loan lenders and guaranty agencies are denied the notice and process they are due. NCHELP Br. at 16-28.

CONCLUSION

For the foregoing reasons and those in USA Funds' brief on the merits, the judgment of the court of appeals should be reversed.

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UNITED STUDENT AID FUNDS, INC., PETITIONER

v.

FRANCISCO J. ESPINOSA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the confirmation and subsequent completion of respondent's plan under Chapter 13 of the Bankruptcy Code had the effect of discharging his student loan debt, notwithstanding his failure to initiate an adversary proceeding to determine dischargeability and the lack of any determination by the bankruptcy court that "excepting [the] debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a)(8).

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In the Supreme Court of the United States

No. 08-1134

UNITED STUDENT AID FUNDS, INC., PETITIONER

v.

FRANCISCO J. ESPINOSA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The United States is both a direct lender and a guarantor of student loans. The government's current loan portfolio is worth approximately $618 billion. The Court's resolution of this case also may have implications for various other debts that are owed to the federal government and are non-dischargeable in bankruptcy, including taxes or customs duties; non-tax fines, penalties, and forfeitures; and restitution orders. The United States therefore has a significant interest in this case.

STATEMENT

1. a. Chapter 13 of the Bankruptcy Code permits "individual debtors [to] obtain adjustment of their indebtedness through a flexible repayment plan approved by a bankruptcy court." *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 327 (1993). To proceed under Chapter 13, a debtor must have "regular income" and his indebtedness must be below certain statutory limits. 11 U.S.C. 109(e).

A debtor initiates a Chapter 13 proceeding by filing a petition with the appropriate bankruptcy court, 11 U.S.C. 301(a), and he must file a proposed plan within 15 days after filing the petition, 11 U.S.C. 1321; Fed. R. Bankr. P. 3015(b). The bankruptcy court holds a confirmation hearing, 11 U.S.C. 1324, and must confirm the plan if it satisfies certain criteria, 11 U.S.C. 1325. The debtor must then make all payments required under the plan, 11 U.S.C. 1326, a process that takes between three and five years. 11 U.S.C. 1322(d), 1325(b)(4). If the debtor completes the plan, the bankruptcy court enters a discharge order under 11 U.S.C. 1328(a), which "operates as an injunction against" efforts to "collect, recover or offset any * * * debt" that was "discharged under [that] section." 11 U.S.C. 524(a)(1) and (2).

b. A full-compliance discharge under Chapter 13 "is broader than the discharge received in any other chapter" of the Bankruptcy Code. 8 *Collier on Bankruptcy* ¶ 1328.01, at 1328-5 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. Sept. 2005) (*Collier*). Certain debts, however, remain non-dischargeable even in a Chapter 13 proceeding. In particular, Chapter 13 incorporates 11 U.S.C. 523(a)(8), which provides that a discharge order "does not discharge an individual debtor from" most student loan debt "unless excepting such

debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." See 11 U.S.C. 1328(a)(2).[1]

c. The Federal Rules of Bankruptcy Procedure (Bankruptcy Rules) establish certain procedures for "determin[ing] the dischargeability of a debt." Fed. R. Bankr. P. 7001(6). "Because student loan debts are not automatically dischargeable," those Rules "require the debtor to file an 'adversary proceeding' against" the relevant creditor in order to obtain a discharge. *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 451 (2004) (*Hood*).

Although an adversary proceeding "is considered part of the original bankruptcy case," *Hood*, 541 U.S. at 452, it "has all the trappings of civil litigation," *Educational Credit Mgmt. Corp.* v. *Mersmann (In re Mersmann)*, 505 F.3d 1033, 1043 (10th Cir. 2007) (en banc). The debtor initiates an adversary proceeding by filing a complaint, Fed. R. Bankr. P. 7003, which must satisfy the requirements of Federal Rule of Civil Procedure 8, see Fed. R. Bankr. P. 7008, and must be served on the creditor along with a summons issued by the clerk. Fed. R. Bankr. P. 7004. In addition to the methods of service permitted by the Federal Rules of Civil Procedure, the Bankruptcy Rules also authorize service by mail. Fed. R. Bankr. P. 7004(b). If the creditor is a corporation, service must be made on "a managing or general agent, or * * * any other agent authorized by appointment or

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[1] At the time of the discharge order in this case, Section 523(a) also provided for discharge of any student loan debt that first became due more than seven years before the filing of the bankruptcy petition. 11 U.S.C. 523(a)(8)(A) (1994). That provision is not at issue here because respondent filed his bankruptcy petition less than five years after receiving his first student loan. Pet. App. 60-61.

by law to receive service of process." Fed. R. Bankr. P. 7004(b)(3). If the federal government is a creditor, as often is the case with student loan debts, service must be made on the Attorney General, the local United States Attorney, and the appropriate federal agency. Fed. R. Bankr. P. 7004(b)(4) and (5).

The procedures for providing notice of a Chapter 13 plan are considerably less rigorous. The clerk must give all parties in interest at least 25 days' written notice of the deadline for filing objections and the date of the confirmation hearing. Fed. R. Bankr. P. 2002(b). That notice need not include a copy of the plan itself; "a summary of the plan" is sufficient. Fed. R. Bankr. P. 3015(d). In addition, unlike an adversary complaint, notice under Bankruptcy Rule 2002(b) need not be directed to an agent authorized to receive service of process. Instead, notice may be "mailed to the address shown on the list of creditors or schedule of liabilities" filed by the debtor along with the bankruptcy petition. Fed. R. Bankr. P. 2002(g)(2).

2. During 1988 and 1989, respondent obtained four federally guaranteed student loans that totaled $13,250 and accrued interest at varying rates. Pet. App. 52, 60-61. On December 7, 1992, respondent filed a Chapter 13 petition and a proposed plan. *Id.* at 61. The only specific indebtedness identified in respondent's bankruptcy petition was his student loan debt. J.A. 15-20. The plan proposed to repay only the principal on that debt, and it stated that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." J.A. 26. The plan did not assert that failing to discharge the interest on respondent's student loan debt would impose an "undue hardship" on respondent and his dependents, nor

did it suggest that plan confirmation would constitute an "undue hardship" finding by the bankruptcy court.

Respondent did not initiate an adversary proceeding in order to determine the dischargeability of the interest on his student loan debt. Instead, the clerk of the bankruptcy court mailed a one-page notice form and a copy of respondent's proposed plan to petitioner at the post office box. Pet. App. 14 n.4, 71; J.A. 34 (copy of notice). Immediately below the caption, the plan stated: "WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." J.A. 23. The plan also listed the deadline for filing a proof of claim, J.A. 26–27, and stated that "[o]bjections, by any creditor, must be filed seven (7) days prior to the hearing on Confirmation of [the] Plan." J.A. 26.

The clerk's notice was stamped "REC'D" by petitioner's litigation department on December 18, 1992. J.A. 34. On January 8, 1993, petitioner filed a proof of claim for $17,832.15, which represented both the principal and accrued interest on respondent's student loans. J.A. 35 & n.**; Pet. App. 62 n.2. Petitioner did not object to confirmation of the plan, and respondent did not object to petitioner's proof of claim. *Id.* at 62, 72.

On May 6, 1993, the bankruptcy court entered an order stating that respondent's "Chapter 13 plan is approved and the Debtors are ordered to comply therewith." J.A. 43. The court made no finding that failing to discharge the interest on respondent's student loan debt would impose undue hardship on respondent and his dependents. Petitioner was not provided with a copy of the bankruptcy court's confirmation order. Pet. App. 62.

A month after the bankruptcy court entered its confirmation order, the Chapter 13 Trustee mailed petitioner a pre-printed form labeled "TRUSTEE'S NO-

TICE TO CREDITOR." J.A. 44. That form had a box checked stating that "[t]he amount of the claim filed differs from the amount listed for payment in the plan" and that "[y]our claim will be paid as listed in the plan." *Ibid.* The form also stated that "[i]f an interested party wishes to dispute the above stated treatment of the claim, it is the responsibility of the party to address the dispute" by notifying the trustee. *Ibid.* Petitioner did not respond to that notice. Pet. App. 63.

Respondent completed all payments provided for in the plan, including the $13,250 designated for payment to petitioner. Pet. App. 63. On May 30, 1997, a second bankruptcy judge entered a one-page order stating that respondent was "discharged from all debts provided for by the plan or disallowed under 11 [U.S.C.] § 502, *except*" for six specified categories of debt. J.A. 46 (emphasis added). The third category listed included "any debt * * * for a student loan." J.A. 46. Respondent neither sought reconsideration of the discharge order nor filed a notice of appeal. Pet. App. 52.

3. Pursuant to a reinsurance agreement, respondent's loans were assigned to the United States Department of Education, which commenced collection efforts. Pet. App. 63. In 2003, respondent reopened his bankruptcy case, and he later filed a motion asking the bankruptcy court, *inter alia*, to order various entities, including petitioner, to cease all collection efforts. C.A. E.R. 39-43. Petitioner opposed that motion and filed a cross-motion for relief from the bankruptcy court's confirmation order, arguing that the order had been entered in violation of the Bankruptcy Code and Rules and that respondent's student loan debt had not been discharged. Pet. App. 6; C.A. E.R. 72-87. Petitioner also requested a recall of respondent's loans from the Department of

Education, which was completed on June 3, 2004. Pet. App. 63.

On August 12, 2004, a third bankruptcy judge granted respondent's motion in relevant part, denied petitioner's cross-motion, and ordered all claimants to "cease and desist all collection activity against" respondent. Pet. App. 79.

Petitioner appealed to the district court, which reversed. Pet. App. 60-70. The district court concluded that the bankruptcy court's confirmation order was "void," and it remanded "for an adversary hearing to determine whether [respondent] qualifies under the 11 U.S.C. § 523(a)(8) exception for the discharge of his student loan." *Id.* at 60.

4. The court of appeals reversed and remanded. Pet. App. 1-27.

a. In an initial per curiam opinion, the court of appeals remanded the case to the bankruptcy court for the limited purpose of addressing whether its discharge order—which, as noted above, specifically excluded student loan debt from discharge—"was entered as a result of a clerical error and, if so, whether to correct it so as to conform to [respondent's] Chapter 13 plan." Pet. App. 59. The court of appeals observed that such a limitation on discharge was "inconsistent with" the confirmed plan's terms, and it hypothesized that the clerk of the bankruptcy court may have generated the discharge order without tailoring it to "the facts of [respondent's] case." *Id.* at 57-58 (internal quotation marks and citation omitted).

b. On remand, the bankruptcy judge who had ruled on the 2003 motions issued a new order. The bankruptcy court found that the language excepting respondent's student loan debt from discharge "was inserted because

of a clerical mistake, because it was the clear intent of the Court, as reflected in the Chapter 13 Plan, as approved by the Court, that all student loan-related obligations were to be discharged if the debtor successfully performed and completed the Plan." J.A. 48. The bankruptcy court ordered the relevant paragraph stricken from the discharge order, and further ordered that respondent "be * * * discharged from all obligations of any nature whatsoever arising from or relating to the Student Loans listed in" respondent's bankruptcy petition. *Ibid.*

c. Following the remand, the court of appeals reversed the district court's decision and remanded the case to the bankruptcy court with directions to reinstate its order enjoining any attempt to collect the unpaid portion of respondent's student loan debt. Pet. App. 26-27. The court framed the issue as "[w]hether a debtor may obtain discharge of a student loan by including it in a Chapter 13 plan, if the creditor fails to object after notice of the proposed plan." *Id.* at 5. It concluded that such a discharge was consistent both with the Bankruptcy Code and Rules, *id.* at 8-18, and with the Due Process Clause, *id.* at 18-25.

The court of appeals determined that its previous decision in *Great Lakes Higher Education Corp.* v. *Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999) was "on all fours with our case" and "foreclose[d]" petitioner's statutory argument. Pet. App. 8. The court observed that petitioner could have "insist[ed] on the special procedures available to student loan creditors by objecting to the plan on the ground that there ha[d] been no undue hardship finding," but that petitioner had raised no such objection. *Id.* at 10; see *id.* at 14-15. The court also stated that "[a] bankruptcy discharge order is

a final judgment" and that "[e]rrors committed during the course of litigation must be corrected by way of a timely appeal." *Id.* at 11.

The court of appeals also rejected petitioner's argument "that the discharge order is void because [petitioner] was denied due process." Pet. App. 18. The court stated that a party who "is adequately notified of a pending lawsuit * * * is deemed to know the consequences of responding or failing to respond." *Id.* at 20. Because petitioner "receive[d] actual notice of [respondent's] bankruptcy case," the court of appeals concluded that it had suffered no violation of its rights under the Due Process Clause. *Id.* at 21.[2]

SUMMARY OF ARGUMENT

Respondent's student loan debt has not been discharged because petitioner did not waive or forfeit its right to contest discharge and the bankruptcy court has not made the undue hardship finding that is an essential prerequisite to discharge of such debt.

A. The court of appeals held that petitioner had waived its objection to discharge of a portion of respondent's student loan debt by failing either to object to the discharge in the bankruptcy court proceedings or to appeal the confirmation or discharge order. Under the Bankruptcy Code, however, the debtor must affirmatively secure an undue hardship finding in order to ob-

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[2] The court of appeals noted that some bankruptcy judges had announced that they would not confirm plans that purported to discharge student loan debts and that one bankruptcy judge had suggested that including such provisions in a proposed plan might subject a debtor's counsel to sanctions. Pet. App. 25-26. The court disapproved both practices, stating that "student loan debts can be discharged by way of a Chapter 13 plan" and that bankruptcy judges "have no business standing in the way" if a creditor fails to object. *Id.* at 26.

tain a discharge of student loan debt. The Bankruptcy Rules establish a procedure for obtaining such a finding, and the debtor is responsible for initiating that procedure. The court of appeals' waiver analysis has the practical effect of shifting to the creditor the burden that the Code and Rules place upon the debtor. By contrast, another provision of the same statutory section provides that certain non-dischargeable debts—but not student loan debts—are covered by a discharge order unless a creditor requests a hearing. The court of appeals' approach effectively subjects student loan debt to the same procedural regime, notwithstanding Congress's evident intent that the two categories of debt be treated differently.

Petitioner was not required to appeal from the confirmation or discharge order to preserve its right to seek repayment of respondent's remaining student loan debt after the plan was completed. The Bankruptcy Code states that a discharge order "does not discharge an individual debtor from" most student loan debt "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. 523(a) and (8). This provision is framed as a self-executing limitation on the effect of a discharge order rather than as a directive to bankruptcy courts about what plans to confirm. By contrast, numerous other provisions of the Bankruptcy Code are framed as directives to the bankruptcy court. To the extent that Section 523(a) is ambiguous in this regard, construing that provision as a limitation on the legal effect of a discharge order serves Congress's purposes by preventing debtors from circumventing statutory bans on the discharge of other categories of debt, such as domestic support obligations.

B. Discharge of student loan debt without an undue hardship finding is inconsistent with the background and purposes of Section 523(a)(8). For more than 30 years, Congress has acted repeatedly to restrict the discharge of student loan debt in bankruptcy, both to prevent abuses of the student loan system by debtors and to safeguard the financial integrity of the government entities and nonprofit institutions that participate in it.

C. Treating an undue hardship finding as a precondition to discharge is fair to both debtors and creditors. Because student loan debt is presumptively non-dischargeable, it makes sense to place the onus on debtors to request an undue hardship determination rather than on creditors to scrutinize every one of the vast number of Chapter 13 plans that they receive. There is no reason to believe that involved proceedings will be necessary every time a debtor seeks an undue hardship determination. Requiring a debtor to obtain such a determination in order to discharge a student loan debt also avoids creating ethical quandaries for debtors' attorneys.

D. Because respondent did not initiate an adversary proceeding and the bankruptcy court made no undue hardship finding in this case, respondent's student loan debt has not been discharged, and petitioner did not violate the discharge injunction by seeking to collect that debt. The Court therefore need not address the question whether or under what circumstances the waiver rule announced by the Ninth Circuit might violate the Due Process Clause.

ARGUMENT

THE BANKRUPTCY COURT'S DISCHARGE ORDER DID NOT DISCHARGE RESPONDENT'S STUDENT LOAN DEBT BECAUSE THE COURT DID NOT FIND, PURSUANT TO THE PROCEDURES SPECIFIED IN THE BANKRUPTCY RULES, THAT FAILURE TO DO SO WOULD CREATE UNDUE HARDSHIP FOR THE DEBTOR AND HIS DEPENDENTS

A. Petitioner Was Not Required To Demand An Adversary Proceeding Or To Appeal From The Confirmation Or Discharge Order To Preserve Its Right To Collect The Remainder Of Respondent's Student Loan Debt After Respondent's Chapter 13 Plan Was Completed

Respondent's Chapter 13 plan proposed to pay $13,250 to petitioner in satisfaction of respondent's student loan debt and to discharge the remainder of that debt. J.A. 26. Respondent did not contend, however, that a failure to discharge the remaining debt would subject him to undue hardship, he did not initiate the adversary proceeding that the Bankruptcy Rules specify as the required mechanism for resolving issues of dischargeability; and the bankruptcy court made no undue hardship finding. In holding that the bankruptcy court's discharge order nevertheless precluded petitioner from attempting to collect the remaining debt, the court of appeals found that petitioner had forfeited its right to insist that the statutory prerequisite to discharge be satisfied by failing (a) to object to the plan during the bankruptcy court proceedings and (b) to appeal from the confirmation and discharge orders. Pet. App. 10-11, 14-16. That analysis is erroneous.

1. Petitioner did not waive its right to an undue hardship determination by failing to object to respondent's plan or to demand an adversary proceeding

The court of appeals stated that, when a creditor receives notice of a proposed Chapter 13 plan that provides for the discharge of student loan debt, the creditor can "insist on the special procedures available to student loan creditors by objecting to the plan on the ground that there has been no undue hardship finding." Pet. App. 10. The court further indicated that a creditor who fails to "insist" on an adversary proceeding in these circumstances thereby "waive[s] or forfeit[s]" any objection to discharge of the debt. *Ibid.* That analysis is inconsistent with the Bankruptcy Code, the Bankruptcy Rules, and this Court's decision in *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004).

a. Section 523(c) provides that "the debtor shall be discharged" from debts that fall within three of the 19 categories of non-dischargeable debt specified in Section 523(a) "unless" the creditor requests a hearing to determine whether a particular debt falls within a relevant category. 11 U.S.C. 523(c).[3] Student loan debt, however, is not among the categories of debt to which Subsection (c) applies. The logical inference is that a creditor need not request a hearing in order to prevent student loan debt from being discharged in the absence of an undue hardship finding. Accord S. Rep. No. 989, 95th Cong., 2d Sess. 79 (1978) (*Senate Report*) (stating that,

[3] The three categories are debts for things obtained by fraud or false pretenses (11 U.S.C. 523(a)(2)), debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" (11 U.S.C. 523(a)(4)), and debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" (11 U.S.C. 523(a)(6)). See 11 U.S.C. 523(c).

under Section 523(a)(8), "[t]he lender or institution is not required to file a complaint to determine the non-dischargeability of any student loan"). The court of appeals' approach, which treats a student loan creditor's failure to "insist" on an adversary proceeding as a waiver of the creditor's objection to discharge, effectively subjects student loan debt to the same procedural regime that applies to the debts specified in Section 523(c), notwithstanding Congress's evident intent to distinguish between the two categories.

b. The Bankruptcy Rules specify the procedures for resolving questions of dischargeability, including questions as to the presence or absence of "undue hardship" in student loan cases. Those Rules place the burden on the *debtor* to initiate an adversary proceeding through the filing of a complaint and service of the complaint and a summons. Fed. R. Bank. P. 7003, 7004. The practical effect of the court of appeals' approach is to reverse that burden by requiring the *creditor* either to demand an adversary proceeding or to forfeit his objection to discharge. Unlike notice of the plan itself, moreover, the summons and complaint must be specifically directed to an agent of the creditor who is "authorized by appointment or by law to receive service of process." Fed. R. Bankr. P. 7004(b)(3); see pp. 3-4, *supra*. Like the requirement that the debtor initiate the adversary process, that heightened notice requirement is effectively negated if providing notice of the plan to some *other* agent transfers to the student loan creditor the burden of objecting to the discharge.

The court of appeals found that, so long as petitioner had constitutionally adequate notice of respondent's Chapter 13 plan, its failure to demand an adversary proceeding could appropriately be treated as a waiver of

any challenge to the dischargeability of respondent's student loan debt. Pet. App. 21. But the fact that an interested party has actual knowledge of pending legal proceedings does not mean, in and of itself, that the party's failure to assert its rights can be treated as a waiver. Rather, the determination whether a waiver has occurred may depend on whether the party has received the *type* of notice required by applicable law. See *City of New York* v. *New York, New Haven & Hartford Railroad*, 344 U.S. 293, 297 (1953) (holding, under the former Bankruptcy Act, that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred"); *Martin* v. *Wilks*, 490 U.S. 755, 765 (1989) (Under the Federal Rules of Civil Procedure, "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."); *Ruehle* v. *Educational Credit Mgmt. Corp. (In re Ruehle)*, 412 F.3d 679, 685 (6th Cir. 2005) (positing a hypothetical situation in which a plaintiff purported to commence a civil action by filing a motion and mailing it to the defendant). That principle applies with particular force here, where the Bankruptcy Rules squarely place the burden of initiating an adversary proceeding upon the debtor, and the effect of the court of appeals' waiver analysis is to shift that burden to the creditor.

c. This Court's decision in *Hood* confirms that it is the debtor's obligation to obtain an undue hardship finding rather than the creditor's obligation to insist on one. The Court in *Hood* held that "a proceeding initiated by a debtor to determine the dischargeability of a student

loan debt [owed to a State] is not a suit against the State for purposes of the Eleventh Amendment." 541 U.S. at 443. In reaching that conclusion, the Court observed that, because a student loan debtor must "affirmatively secure[] a hardship determination" in order to obtain a discharge, "the major difference between the discharge of a student loan debt and the discharge of most other debts" is that student loan creditors who decline to participate in the bankruptcy proceedings "might still receive some benefit: The debtor's personal liability on the loan may survive the discharge." *Id.* at 450. The Court also noted, with apparent approval, the debtor's concession that "even if [the creditor] ignores the summons and chooses not to participate in the proceeding the Bankruptcy Court cannot discharge her debt without making an undue hardship determination." *Id.* at 453-454.

The Court in *Hood* thus recognized that an actual undue hardship finding by the bankruptcy court is an essential prerequisite to discharge of a student loan debt, even when the debtor properly initiates an adversary proceeding and the creditor does not object to discharge. It follows *a fortiori* that a debtor who does *not* initiate an adversary proceeding cannot obtain a discharge of his student loan debt without an undue hardship finding simply because the creditor does not "insist" on a proceeding that it is the debtor's duty to invoke.[4]

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[4] The court of appeals cited *Hood*'s observation "that an adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to adjudication of the discharge of a student loan." Pet. App. 17-18 (internal quotation marks and citation omitted); accord *Hood*, 541 U.S. at 453 ("The text of § 523(a)(8) does not require a summons, and absent [Federal Rule of Bankruptcy Procedure]

2. Petitioner was not required to appeal the confirmation or discharge order to preserve its right to collect respondent's remaining debt because, under the terms of the applicable Bankruptcy Code provisions, a discharge order does not discharge student loan debt in the absence of an undue hardship determination

The court of appeals also suggested (Pet. App. 10-11) that petitioner's failure to appeal either the confirmation or discharge order independently precluded it from seeking to collect respondent's remaining debt after the completion of respondent's plan. An appeal was unnecessary, however, because the discharge order ultimately entered in this case did not have the effect of discharging respondent's student loan debt.

a. The Bankruptcy Code provides that a discharge order "does not discharge" a covered student loan debt "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the

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7001(6) a debtor could proceed by motion."). But while the details of the procedural scheme are set forth in the Rules rather than the Code, the Court in *Hood* made clear that the *statute* imposes the basic requirement that the debtor must "affirmatively secure[] a hardship determination." *Id.* at 450. The court of appeals' approach, under which the debtor's submission of a plan that provides for discharge of student loan debt shifts to the creditor the burden of objecting, is thus inconsistent with the Code as well as with the Rules. In addition, the heightened notice requirements described above still would apply even if the Bankruptcy Rules *did* permit a debtor to seek to discharge a student loan debt by filing a motion rather than commencing an adversary proceeding. See Fed. R. Bankr. P. 9014(b) (providing that a "motion shall be served in the manner provided for service of a summons and complaint by Rule 7004").

debtor's dependents." 11 U.S.C. 523(a) and (a)(8).[5] This provision is not framed as a directive to the bankruptcy court. Instead, it is a "self-executing" limitation on the effect of a discharge order. *Hood*, 541 U.S. at 450; accord *Senate Report* 79 (describing Section 523(a)(8) as "self-executing"). Accordingly, the most natural reading of Section 523(a)(8) is that, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." *Hood*, 541 U.S. at 450; see *id.* at 444 (describing Section 523(a)(8) as providing that covered student loans "are not included in a general discharge order unless the bankruptcy court" makes an "undue hardship" finding).

Unlike Section 523(a), other provisions of the Bankruptcy Code *are* framed as directives to the bankruptcy court. Another provision in the same statutory Section provides that "the court shall" award costs and fees to the debtor in certain circumstances and "shall not award" costs and fees in other circumstances. 11 U.S.C. 523(d). Other provisions of the Bankruptcy Code, including provisions in Chapter 13, also provide that bank-

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[5] Section 523(a)(8) is not by its terms directly applicable to Chapter 13 cases in which the debtor successfully completes performance under a confirmed plan. Instead, Section 523(a)(8) is incorporated via Section 1328, which provides that "the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt * * * of the kind specified in" eight enumerated paragraphs of Section 523(a). 11 U.S.C. 1328(a) and (a)(2). "The effect of this [provision] is to exclude from the full-compliance discharge [under Chapter 13] those debts for educational loans that are nondischargeable under section 523(a)(8)." 8 *Collier* ¶ 1328.02[3][h], at 1328-20; accord Br. in Opp. 6 n.3 (describing Section 1328(a)(2) as "making § 523(a)(8) applicable in Chapter 13 cases").

ruptcy courts "shall not"[6] or "may not"[7] do certain things. Another provision states that an action "does not" have a certain effect "[u]nless the [bankruptcy] court, for cause, orders otherwise." 11 U.S.C. 349. In contrast, Section 523(a)(8) states that a discharge order "does not" have a certain effect "unless" a particular condition is satisfied.

That difference is significant. As the court of appeals explained, a final judgment is ordinarily binding, and an injunction must be obeyed, even if the issuing court has exceeded its authority or has committed legal error in the course of adjudicating the suit. Pet. App. 10-11. "[A] final judgment cannot be ignored or set aside just because it was the result of an error," but rather "must be corrected by way of a timely appeal." *Id.* at 11; see *Travelers Indem. Co.* v. *Bailey*, 129 S. Ct. 2195, 2205 (2009). Under the statutory provisions governing discharge of student loan debt, however, petitioner was not required to appeal either the confirmation or the discharge order in order to preserve its right to collect respondent's debt after the Chapter 13 plan had been completed. Such an appeal was unnecessary because, in the absence of an undue hardship finding, a bankruptcy discharge "does not discharge an individual debtor from any debt" (11 U.S.C. 523(a)) for student loans covered by Section 523(a)(8).

The court of appeals emphasized that a "discharge injunction" comes "into force by operation of law upon entry of the discharge" and "preclud[es] the creditor, on

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[6] 11 U.S.C. 330(a)(4)(A), 366(c)(1)(B), 1328(f) and (g)(1).

[7] 11 U.S.C. 105(b), 326(b), 341(c), 505(a)(2), 706(c), 707(b)(1), (b)(2)(D) and (c)(3), 904, 921(e), 1112(c), 1129(d), 1222(c), 1225(b)(1), 1228(f), 1229(c), 1307(f), 1322(d)(2), 1325(b)(1), 1328(h), 1329(c), 1501(d), 1521(d).

pain of contempt, from taking *any* actions to enforce the discharged debt." Pet. App. 13. As the court of appeals' own description recognizes, however, the discharge injunction under the Bankruptcy Code is limited by its terms to "actions to enforce the *discharged* debt." *Ibid.* (emphasis added); see 11 U.S.C. 524(a)(1) (referring to "any debt discharged under section * * * 1328 of this title"), 524(a)(2) (discharge "operates as an injunction against" any act "to collect, recover or offset any such debt"). Because the effect of Section 523(a)(8) was to prevent the discharge from encompassing respondent's student loan debt in the absence of an undue hardship finding, the discharge injunction likewise did not cover that debt.

b. To the extent that the statutory language is otherwise ambiguous, this reading of Section 523(a) effectuates the intent of Congress by preventing debtors from evading statutory prohibitions on the discharge of other categories of debt. For example, Section 523(a)(1)(B)-(C) provides that a discharge order "does not discharge" specified types of tax debt; Section 523(a)(5) provides that it "does not discharge * * * any debt * * * for a domestic support obligation"; and Section 523(a)(9) provides that it "does not discharge" debts "caused by" the debtor's unlawful operation of a motor vehicle while impaired by drugs or alcohol. See 11 U.S.C. 1328(a)(2) (making those provisions applicable to Chapter 13 proceedings such as this one). As with student loan debt, those debts are not among the categories for which Section 523(c)(1) requires the creditor to object to discharge.

By rendering certain debts completely nondischargeable, those provisions reflect Congress's determination that the compelling societal interests in the

satisfaction of such obligations should take precedence over the debtor's interest in obtaining a fresh start in bankruptcy. The Ninth Circuit's analysis, however, invites debtors to attempt to escape liability for debts within those categories as well as for student loan debt (which can lawfully be discharged if the debtor initiates an adversary proceeding and the bankruptcy court makes an undue hardship finding). As here, the debtor could include language in a proposed bankruptcy plan stating that confirmation of the plan would extinguish the relevant debts. Then, if the creditor did not object and the plan was confirmed and subsequently completed, the debtor could argue that the debts had been discharged and that the discharge (though illegal) was not subject to later reexamination. In a prior decision, the Ninth Circuit acknowledged that possibility but stated only that it "d[id] not address any of the public policy concerns that might impact the dischargeability of such obligations as alimony or child support." *Great Lakes Higher Educ. Corp.* v. *Pardee (In re Pardee)*, 193 F.3d 1083, 1087 n.6 (1999). In contrast, no such difficulties arise if Section 523(a) is understood to limit the legal effect of a discharge order rather than to provide direction to bankruptcy courts about what plans to confirm.

c. On the facts of this case, it is particularly clear that petitioner's failure to take an appeal did not effect a forfeiture of its right to collect the unpaid portion of respondent's student loan debt after the completion of the plan. The discharge order entered in May 1997 expressly *excluded* "any debt * * * for a student loan" from the categories of debts being discharged. J.A. 46. A different bankruptcy judge subsequently concluded that this exclusion was a "clerical mistake," J.A. 48, and

the court of appeals accepted that characterization. It is at least equally plausible, however, that the bankruptcy court in issuing the discharge order recognized (perhaps belatedly) that, in the absence of an undue hardship finding, any unpaid student loan debt could not be discharged. In any event, petitioner's failure to appeal a discharge order that specifically excluded the debt at issue here cannot reasonably be viewed as a waiver of its right to pursue continued collection efforts.

d. The court of appeals relied (Pet. App. 35) on 11 U.S.C. 1327(a), which states that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." The issue before the Court, however, does not involve whether the plan was binding on petitioner and respondent, since respondent does not contend that petitioner violated the plan's terms while it was in effect. Instead, the question here involves the legal effect of the discharge order that the bankruptcy court entered upon respondent's completion of the plan. With respect to that question, Section 523(a)(8), not Section 1327(a), is the controlling provision.

In any event, any possible tension between Section 523(a)(8) and Section 1327(a) is properly resolved by the "commonplace of statutory construction that the specific governs the general." *Morales* v. *TWA*, 504 U.S. 374, 384 (1992). Section 523(a)(8) is the more specific provision because it directly addresses the circumstances under which a bankruptcy court's discharge order discharges a particular type of presumptively nondischargeable debt. In contrast, Section 1327(a) prescribes the general effects of plan confirmation as be-

tween the debtor and creditor, and it does not address any limits on the legal effect of a bankruptcy court's discharge order.[8]

B. Permitting Discharge Of Student Loan Debt Without An Undue Hardship Finding Is Inconsistent With The Background And Purposes Of Section 523(a)(8)

Until 1977, student loans were dischargeable in bankruptcy on the same terms as other debts. See 11 U.S.C. 35 (1976) (listing non-dischargeable debts). Since then, Congress has acted repeatedly to restrict the discharge of student loan debt in bankruptcy. The history and purposes of those enactments confirm that a discharge order does not discharge a student loan debt unless the bankruptcy court finds that failure to do so will result in undue hardship to the debtor and his dependents.

1. In 1976, Congress enacted legislation "making it more difficult for debtors to discharge student loans guaranteed by States." *Hood*, 541 U.S. at 449. That statute provided that such debt "may be released by a discharge in bankruptcy * * * only if" (1) the loan had been outstanding for more than five years as of the discharge date, or (2) "the court in which the proceeding [was] pending determine[d] that payment from future income or other wealth w[ould] impose an undue hardship on the debtor or his dependents." Education

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[8] Neither the court of appeals nor respondent has relied upon Section 1327(b) or (c), which together provide that confirmation of a Chapter 13 plan generally "vests all of the property of the estate in the debtor" and does so "free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. 1327(b)-(c). Like Section 1327(a), these provisions do not specifically address debts that are excepted from discharge by Section 523(a).

Amendments of 1976, Pub. L. No. 94-482, § 439A(a), 90 Stat. 2141.

In 1978, Congress replaced the Bankruptcy Act with the Bankruptcy Code, which contained a provision whose wording closely paralleled current Section 523(a)(8). That provision stated that "[a] discharge under" three specified sections of the Bankruptcy Code "d[id] not discharge an individual debtor from any debt * * * to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless" one of two conditions was met. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2590-2591. The first basis for discharge under the original Bankruptcy Code was that the "loan first became due before five years * * * before the date of the filing of the petition." 11 U.S.C. 523(a)(8)(A) (1982). The second basis was worded identically to current Section 523(a)(8): "unless * * * excepting such debt from discharge * * * will impose an undue hardship on the debtor and the debtor's dependents." *Ibid.*

Since 1978, Congress has consistently expanded the scope of non-dischargeability of student loan debt. In 1990, Congress extended Section 523(a)(8)'s restrictions to discharge orders entered under Section 1328(a), which governs discharges (like the one at issue here) entered following completion of a Chapter 13 plan. Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388-28. That same year, Congress also increased the required waiting period in the absence of undue hardship from five years to seven years. Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, § 3621(1)-(2), 104 Stat. 4964-4965. In 1998, Congress eliminated the provision authorizing time-based discharge of student loan debt,

thus creating the current regime under which all discharges of such debt require an undue hardship finding. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837.[9]

2. The consistent direction of these changes and the reasons underlying them refute any suggestion that debtors can obtain a discharge of student loan debt without an undue hardship determination. "[S]tudent loans are enabling loans [that] allow[] individuals to improve their own human capital and increase their income potential." *Educational Credit Mgmt. Corp.* v. *Mersmann (In re Mersmann)*, 505 F.3d 1033, 1042 (10th Cir. 2007) (en banc) (internal quotation marks and citation omitted). Because the principal benefit of student loans—that is, an education—cannot be seized in the event of a default, policymakers feared that, without federal guarantees, "most lenders would * * * refuse to fund a student's pursuit of higher education." *Ibid.* (quoting Seth J. Gerson, *Separate Classifications of Student Loans in Chapter 13*, 73 Wash. U. L.Q. 269, 280 (1995)). As a result, the United States "insures or guarantees lenders and guarantors that the government will repay student loans in the event of a borrower's default." *Ibid.*

The current restrictions on dischargeability of student loan debt in bankruptcy thus serve two fundamental purposes. First, they "prevent[] abuses of the educational loan system by restricting the ability to discharge a student loan shortly after a student's graduation." 4 *Collier* ¶ 523.14[1], at 523-101 (June 2007). Second, they "safeguard[] the financial integrity of governmental

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[9] Because the bankruptcy court's discharge order was entered in 1997, see J.A. 47, the 1998 amendments are not directly applicable to this case. There is no dispute, however, that respondent was ineligible for a time-based discharge under the pre-1998 version of the statute.

entities and nonprofit institutions that participate in educational loan programs." *Ibid.*

Permitting debtors to discharge student loan debt without obtaining the undue hardship determination mandated by Section 523(a)(8) is inconsistent with both purposes. So long as the immediate creditor fails to object, the Ninth Circuit's approach would permit a debtor to obtain a binding discharge of student loan debt immediately upon his graduation and without any determination of undue hardship. Indeed, respondent appears to be precisely the sort of debtor for whom Congress did not intend to authorize a discharge of student loan debt. Respondent sought bankruptcy protection less than five years after he *obtained* his first student loan. Pet. App. 60-61. At the time he filed for bankruptcy, moreover, respondent was employed, J.A. 21, did not assert that he had any dependents, and identified no specific debts beyond his student loans, J.A. 7.

C. Treating An Undue Hardship Finding As A Precondition To Discharge Is Fair To Both Debtors And Creditors

1. Requiring a Chapter 13 debtor to "affirmatively secure[] a hardship determination" (*Hood*, 541 U.S. at 450) in order to discharge a student loan debt makes sense because, as a practical matter, student loan creditors cannot conduct a timely and thorough review of every Chapter 13 plan that they receive. See *Ruehle*, 412 F.3d at 681 (noting that student loan creditors "receive tidal waves of mail"). We are advised that Chapter 13 plans often are mailed only to payment service subcontractors, and that those subcontractors cannot practicably forward those plans promptly enough to permit timely scrutiny by knowledgeable staff members before the date of the confirmation hearing. See Fed. R.

Bankr. P. 2002(b) (providing that notice must be given "not less than 25 days" before the deadline for filing objections). And even when those staff members do timely receive Chapter 13 plans for review, thorough scrutiny of the plan may be impracticable because "there is no fixed form that [the] plan must take, and debtors are allowed to tailor their plans to meet their own needs and circumstances." 8 *Collier* ¶ 1322.01, at 1322-6 to 1322-6.1 (Sept. 2006). In contrast, the procedures for commencing an adversary proceeding are designed to ensure that the appropriate individuals receive prompt and effective notice of the debtor's intent to seek discharge of a presumptively non-dischargeable student loan debt. See, *e.g.*, Fed. R. Bankr. P. 7004(b)(3) (requiring service on "an officer, a managing or general agent, or * * * any other agent authorized by appointment or by law to receive service of process"); Fed. R. Bankr. P. 7008 (incorporating Federal Rule of Civil Procedure 8, and thus requiring that an adversary complaint contain "a short and plain statement of the claim" (Fed. R. Civ. P. 8(a)(2) and "a demand for the relief sought" (Fed. R. Civ. P. 8(a)(3)).

Requiring the debtor to seek an undue hardship determination will not necessitate lengthy or complicated proceedings. A creditor may choose not to contest undue hardship once the issue properly is raised if it concludes that such a finding is warranted or that the costs of contesting the existence of undue hardship would exceed the benefits. Cf. 34 C.F.R. 682.402(i)(1)(iii) (Department of Education regulation permitting, but not requiring, a guaranty agency to refrain from opposing an undue hardship determination if it concludes that "the expected costs of opposing the discharge petition would exceed one-third of the total amount owed on the

loan"). The Federal Rules of Bankruptcy Procedure do not forbid stipulations, and they expressly authorize requests for admission, Fed. R. Bankr. P. 7036, default judgments, Fed. R. Bankr. P. 7055, and summary judgment, Fed. R. Bankr. P. 7056. Although the bankruptcy court must make an explicit undue hardship finding to discharge student loan debt even if the creditor does not object (see p. 16, *supra*), that finding can be made expeditiously.

2. The conclusion that debtors may not discharge a student loan debt simply by including language in a proposed Chapter 13 plan also avoids creating ethical difficulties for debtors' attorneys. As this Court stated in *Hood*, the Bankruptcy Rules "require[] the debtor to file an 'adversary proceeding' against [a creditor] in order to discharge his student loan debt," and the Bankruptcy Code provides that a "Bankruptcy Court cannot discharge [such a] debt without making an undue hardship determination." 541 U.S. at 451, 453-454.

The Ninth Circuit's approach encourages debtors' attorneys to seek to evade both of those requirements by including "plainly illegal provision[s]" in bankruptcy plans. *Ruehle*, 412 F.3d at 681. Doing so, however, would implicate Federal Rule of Bankruptcy Procedure 9011(b)(2), which states that, by presenting a document to a bankruptcy court, an attorney certifies that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law." In addition, the approach approved by the court of appeals depends for its success on the prospect that the bankruptcy court will not become aware of the illegal provisions in time to perform its independent duty to confirm only those plans that "compl[y] with the provi-

sions of" the Bankruptcy Code. 11 U.S.C. 1325(a)(1); see *Johnson* v. *Home State Bank*, 501 U.S. 78, 87 (1991) (stating that "[a] bankruptcy court is authorized to confirm a [Chapter 13] plan *only* if the court finds" that it complies with the requirements set forth in Section 1325(a)) (emphasis added). The Bankruptcy Code should not be construed to encourage "practice by ambush." *Whelton* v. *Educational Credit Mgmt. Corp.*, 432 F.3d 150, 153 (2d Cir. 2005) (citation omitted).

3. The principle that "student loan debt remains due until there is a determination that the loan is dischargeable," 4 *Collier* ¶ 523.14[2], at 523-102, is fair to the debtor's other creditors and to the debtor himself. Because a debtor does not receive a discharge under Chapter 13 until after performance under the plan is complete, 11 U.S.C. 1328(a), a subsequent determination that the discharge order did not effectively discharge the debtor's student loan debt will not affect payments made under the plan to other creditors. The Bankruptcy Code, moreover, imposes no time limit within which an undue hardship determination must be made. Accordingly, a debtor who legitimately qualifies for a discharge of student loan debt but has failed to secure the necessary hardship determination need only do what he should have done in the first place: return to the bankruptcy court and commence an adversary proceeding. See Pet. App. 60 (district court remanding to the bankruptcy court for an undue-hardship determination). In contrast, a debtor who cannot demonstrate undue hardship is prevented from obtaining a windfall to which he is not entitled.

D. Because Respondent Did Not Initiate The Appropriate Procedure For Securing An Undue Hardship Finding And The Bankruptcy Court Made No Such Finding In This Case, Respondent's Student Loan Debt Has Not Been Discharged And The Court Need Not Address The Constitutional Question Presented In The Petition

This Court need not address petitioner's additional contention (Br. 51-58) that the notice it received of respondent's Chapter 13 plan failed to satisfy constitutional due process requirements. Consistent with the Constitution, Congress could have included student loan debt among the debts listed in Section 523(c)(1), for which a creditor must either raise or forfeit its objection to dischargeability. See p. 13 & n.3, *supra*. Had Congress done so, it also could have provided that mailing a student loan creditor notice of a proposed plan at an appropriate address is sufficient to trigger the creditor's duty to contest discharge. See *Jones* v. *Flowers*, 547 U.S. 220, 225-226 (2006) (stating that "due process does not require actual notice" and noting "this Court's ample precedent condoning notice by mail"). Thus, the procedural regime that effectively results from the court of appeals' ruling here would raise no substantial constitutional concerns if Congress had enacted it into law, thereby giving student loan creditors fair warning of the steps needed to preserve their rights to payment.

As explained above, however, the Bankruptcy Code does not require creditors to object to the debtor's plan to preserve the non-dischargeability of student loan debt, but rather places upon student loan debtors an affirmative duty to secure an undue hardship finding as a prerequisite to discharge. In addition, the Bankruptcy Rules require a particular type of notice (service of an

adversary complaint upon specified agents of the creditor) in order to commence proceedings to adjudicate the dischargeability of a student loan debt, and they provide that a creditor's obligation to respond within the context of such a proceeding does not arise until a complaint "is duly served." Fed. R. Bankr. P. 7012(a). The Code and Rules thus assure student loan creditors that their right to full payment will not be placed at issue unless and until the creditor is informed, in compliance with the Rules' heightened notice requirement, that the debtor has sought an undue hardship finding. The gravamen of petitioner's constitutional challenge is that respondent's failure to initiate an adversary proceeding as required by the Code and Rules deprived petitioner of the process it was due. See Pet. Br. 54-55.

The Code and Rule provisions on which petitioner relies make clear, however, that petitioner did not waive its right to pursue continued collection efforts by failing to insist on an adversary proceeding. See pp. 13-16, *supra*. And under Section 523(a)(8), the proceedings in the bankruptcy court did not effect a discharge of respondent's unpaid student loan debt. See pp. 17-23, *supra*. It is therefore unnecessary for the Court to decide whether petitioner would have suffered a deprivation of constitutional magnitude if its right to seek further repayment had been abrogated without the notice and procedures that the Code and Rules require for a discharge of student loan debt.

This Court's usual practice is to avoid deciding constitutional questions whenever possible, see, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2508, 2513 (2009), and there is no reason to depart from that practice here. To the contrary, withholding decision on any constitutional issue would be

particularly appropriate because of the atypical facts of this case. It is undisputed that petitioner's litigation department received *actual* notice of respondent's Chapter 13 plan, the deadline for filing objections, and the date of the confirmation hearing. Pet. App. 21; see J.A. 34. In many other cases, however, it will not be possible to show that the creditor received actual notice. See pp. 26-27, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

—v.—

FRANCISCO J. ESPINOSA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF RESPONDENT FOR AMICI CURIAE PROFESSORS RICHARD AARON, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, ROBERT D'AGOSTINO, KENNETH N. KLEE, GEORGE W. KUNEY, JONATHAN C. LIPSON, LOIS LUPICA, RALPH R. MABEY, C. SCOTT PRYOR, MICHAEL D. SOUSA, AND ROBERT M. ZINMAN

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INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law.[2] They are deeply interested in the outcome of this appeal, not only for its effect on debt restructuring cases under chapter 13 of the Bankruptcy Code,[3] but also because of its potential impact on cases for reorganization under chapters 9, 11 and 12 of the Bankruptcy Code. The *Amici* file this brief in order to underscore the fundamental importance for both debtors and the creditor body to uphold the finality of confirmation orders under chapters 9, 11, 12, and 13, and to bar attacks upon such orders by creditors who choose not to object

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[1] The *Amici* file this brief with the written consent of all parties. No counsel for a party has authored this brief in whole or in part. No person or entity, including the *Amici* or their counsel, made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

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[3] Title 11 of the United States Code is hereinafter referred to as the Bankruptcy Code.

to them during proceedings for confirmation, whether the subsequent challenge to the confirmation order is based on subject matter jurisdictional or substantive bankruptcy law claims.

The *Amici* support the Respondent's analysis upholding the confirmation order and the Respondent's discharge of student loan debt, and offer additional grounds in support of that result. They urge that the Court's holding four months ago in *Travelers Indemnity Company v. Bailey*, ___ U.S. ___, 129 S.Ct. 2195, 2205 (2009), is controlling. There, the Court held that the doctrine of *res judicata* barred creditors in a subsequent proceeding in the same reorganization case from challenging an earlier confirmation order, and ruled that provisions of a confirmation order could not be later attacked, whether or not the order constituted a proper exercise of bankruptcy court jurisdiction or of its substantive bankruptcy law power. The *Amici* urge the Court to hold that a creditor who chooses to remain silent at the confirmation stage after receiving adequate notice that a proposed chapter 13 plan will discharge student loan debt, is barred by *res judicata* from challenging the confirmation order in a later proceeding in the same bankruptcy case.

SUMMARY OF ARGUMENT

The *Amici* urge two independent bases for upholding the confirmation order and discharge at issue:

First: A collateral attack on a confirmation order is barred by *res judicata* even if it is predicated either on a claimed lack of subject matter jurisdiction or of substantive power of the bankruptcy

court. Such a post-confirmation collateral challenge is barred, whether made in the same bankruptcy case or in another case. Moreover, the *Amici* urge that §§ 523(a)(8) and 1328(a)(2) of the Bankruptcy Code (the "Student Loan Provisions") and F. R. Bankr. P. 7001(6) are not jurisdictional in nature, and that the violation of or non-compliance with those provisions does not void an order.

Second: By reason of Bankruptcy Code § 1327(a), each creditor is bound by the discharge provision of a confirmation order to which it did not object after receiving adequate notice of the proposed plan and an opportunity to assert its objection to such provision.

1. *Summary of the res judicata argument*: The doctrine of *res judicata* applies in a subsequent proceeding in the same bankruptcy case. Each of the elements for applicability of the doctrine of *res judicata* is satisfied in this case. Petitioner was served with adequate notice of the confirmation proceeding and of the proposed plan's provision for the discharge of student loan debt, and thereby became a party to that proceeding. It had a full opportunity for a hearing on any objection to confirmation that it might interpose. Bankruptcy Code § 1324(a); F. R. Bankr. P. 2002(b). Moreover, Petitioner was expressly warned that its rights could be impaired by the proposed plan. Nevertheless, it failed to object to confirmation or to appeal from the order confirming the plan. As such, the confirmation order became final and binding on all parties under Bankruptcy Code § 1327(a). Petitioner was thus barred by *res judicata* from raising its claims in Respondent's post-confirmation proceeding to confirm his discharge.

Res judicata is a foundational doctrine of the law, designed to provide certainty for the parties and reliability for the judicial system. The doctrine is of prime importance not only in chapter 13 debt restructuring cases, but also in bankruptcy reorganization cases under chapters 9, 11 and 12. Once a plan has been confirmed, a creditor who receives adequate notice of the confirmation hearing but chooses not to object to confirmation or to appeal the confirmation order, is barred by *res judicata* from attacking the confirmation order on any ground, whether the challenge is based on an asserted lack of subject matter jurisdiction or substantive power of the bankruptcy court. These principles were made clear by the Court in *Travelers v. Bailey*, which the *Amici* urge is controlling. Under the Court's holding in that case, Petitioner's attack on the confirmation order must fail.

In *Travelers v. Bailey*, the Court held that a creditor was barred by *res judicata* from challenging a confirmation order in a post-confirmation proceeding in the same bankruptcy case. Although the doctrine of *res judicata* has long been applied to bar a subsequent challenge asserted in a different case, *Travelers v. Bailey* applied the doctrine to an attack on a confirmation order made in a proceeding in the same bankruptcy case in which the confirmation order had been issued. As ruled by *Travelers v. Bailey*, all attacks, whether made by a post-confirmation proceeding filed in the same bankruptcy case or in a different case in a non-bankruptcy court, constitute collateral attacks made impermissible by the doctrine of *res judicata*. The Court made clear in that case that the basic reason for the doctrine is to provide finality for confirmation orders.

Travelers v. Bailey, moreover, also makes clear that the doctrine of *res judicata* applies to bar all claims, whether based on an asserted lack of jurisdiction for a provision of the confirmation order or a lack of substantive power of the bankruptcy court. Thus, even if the Student Loan Provisions were viewed as jurisdictional or beyond the power of the bankruptcy court, which *Amici* believe they are not, *res judicata* precludes a challenge to a confirmation order based on them. Petitioner's fundamental position on this appeal never comes to grips with the impact of *res judicata*, and does not address or even cite the Court's decision in *Travelers v. Bailey*.

Petitioner also argues that the bankruptcy court lacked the jurisdiction to confirm a plan for discharge of student loan debt without an undue hardship determination made in an adversary proceeding pursuant to F. R. Bankr. P. 7001(6). That contention is likewise flawed because that provision cannot be viewed as jurisdictional in nature in light of decisions of this Court and F. R. Bankr. P. 9030.

2. *Summary of the argument based on § 1327(a).* Independent of the bar of *res judicata*, the *Amici* urge that a challenge to a discharge of a student loan debt provided for by a confirmed chapter 13 plan cannot be made because of § 1327(a) of the Bankruptcy Code. Section 1327(a), like its analogue in chapters 9, 11 and 12 (set forth in Bankruptcy Code §§ 944(a), 1141(a), and 1227(a)), states that, "the provisions of a confirmed plan . . . bind . . . each creditor, . . . whether or not such creditor has objected to . . . the plan." The plain text of § 1327(a) should be applied as written. Congress has been both clear and emphatic in the language it chose for § 1327(a) to make all provisions of a confirmed plan

binding on each creditor. To allow a creditor's post-confirmation attack on the confirmation order would require the Court to disregard that statute. That statute makes no exception for provisions of any type. Thus, no provision of a confirmed plan may be attacked by a creditor after confirmation if the creditor has not objected to the plan proposed for confirmation or appealed the confirmation order.

POINT I

PETITIONER'S CLAIM IS BARRED BY *RES JUDICATA*, WHICH PRECLUDES A CHALLENGE TO A CONFIRMATION ORDER IN A POST-CONFIRMATION PROCEEDING IN THE SAME BANKRUPTCY CASE

The doctrine of *res judicata* bars all post-confirmation objections to a confirmed plan. The Court left no doubt about the total bar of the doctrine of *res judicata* by its broad and unqualified language in *Travelers v. Bailey*, 129 S.Ct. 2195, decided scarcely four months ago. *Travelers v. Bailey* is controlling.

A. Travelers v. Bailey Bars Collateral Attack of Confirmation Orders in the Same Bankruptcy Case

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). A bankruptcy court's order confirming a plan of reorganization is a final order entitled to *res judicata* effect. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72

(1938). *Res judicata* precludes a collateral attack upon a confirmation order even when the bankruptcy court entering the order lacked subject matter jurisdiction to do so. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940).

The Court's prohibition on the collateral attack of confirmation orders has usually arisen in response to post-confirmation objections raised outside the debtor's bankruptcy case in an action brought in a non-bankruptcy court. *See e.g., Stoll v. Gottlieb*, 305 U.S. 165 (applying *res judicata* to preclude collateral attack of confirmation order in Illinois state court action); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (applying *res judicata* to preclude collateral attack of confirmation order in United States district court). In *Travelers v. Bailey*, the Court held that *res judicata* also precludes collateral attack upon a confirmation order in a later proceeding in the *same* bankruptcy case. *Travelers v. Bailey*, 129 S.Ct. at 2206.

The circumstances in the present case regarding *res judicata* mirror those in *Travelers v. Bailey*. In *Travelers v. Bailey*, the Court granted *certiorari* to review whether the Court of Appeals had erroneously held, in a post-confirmation proceeding in the chapter 11 bankruptcy case of Johns-Manville Corporation, that the bankruptcy court did not have subject matter jurisdiction to issue a confirmation order enjoining the prosecution of claims against non-debtors that did not directly affect the *res* of the bankruptcy estate.

The Court, however, did not decide the issue for which it had granted *certiorari* in that case. *Travelers v. Bailey*, 129 S. Ct. at 2207. Instead, the Court determined the appeal on the basis of the paramount

importance of the doctrine of *res judicata*, holding that *res judicata* barred the post-confirmation attack in Manville's bankruptcy case on the injunction included in the confirmation order. In the present case, *certiorari* was granted to review whether a chapter 13 confirmation order erroneously confirmed a plan that provided for the discharge of student loan debt without a determination of undue hardship, and to consider a related notice issue. Here, as in *Travelers v. Bailey*, the attack on the confirmation order was made in a subsequent proceeding in the bankruptcy case. As in *Travelers v. Bailey*, the Court in the present case should not address the substantive issue it accepted for review, but instead should bar Petitioner's attack on the confirmation order on the basis of *res judicata*.

In *Travelers v. Bailey*, a plan of reorganization providing for the treatment of massive asbestos related personal injury claims, was confirmed. Years after confirmation of Manville's plan of reorganization, certain asbestos-injured claimants brought lawsuits in state courts across the country against Petitioner, who was Manville's insurer. Petitioner then brought a proceeding within Manville's bankruptcy case for an interpretation that the injunctive provision built into the confirmation order was intended to bar those lawsuits. The Court of Appeals for the Second Circuit held that the bankruptcy court lacked subject matter jurisdiction to grant the injunction.

The Court reversed. Under the Court's ruling, it did not matter whether or not the bankruptcy court lacked subject latter jurisdiction or power to issue the order, holding that under either circumstance the later attack on the order in the same bankruptcy

case was barred by *res judicata*. The Court made it crystal clear that *res judicata* bars all post-confirmation challenges to confirmation orders. As stated by the Court: "[O]nce the 1986 orders became final on direct review (*whether or not [they were] proper exercises of bankruptcy court jurisdiction and power*), they became *res judicata*," and the Court barred the assertion of any matter that could have been raised in the proceeding for confirmation in opposition to the provision in question. *Travelers v. Bailey*, 129 S. Ct at 2205 (emphasis added). The Court went on to state:

> So long as respondents or those in privity with them were parties to the Manville bankruptcy proceeding, and were given a fair chance to challenge the Bankruptcy Court's subject-matter jurisdiction [to issue the injunction incorporated into the confirmation order], they cannot challenge it now [in the subsequent proceeding for an interpretation of the scope of that provision] by resisting enforcement of the 1986 Orders.

Id. at 2206.

The Court's broad view of *res judicata* and its importance is unmistakably clear:

> The willingness of the Court of Appeals to entertain this sort of collateral attack cannot be squared with *res judicata* and the practical necessity served by that rule.

Id. at 2206 (citing, *inter alia*, *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1308 (11th Cir. 2005) (barring collateral attack of confirmation order in later proceeding in same bankruptcy case and noting that if "courts could evaluate the jurisdiction

that they may or may not have had to issue a final judgment, the rules of *res judicata* . . . would be entirely short-circuited.")).

Like the unsuccessful respondents in *Travelers v. Bailey*, Petitioner in the present case seeks to attack a confirmation order in a subsequent proceeding in the same bankruptcy case, essentially claiming a lack of jurisdiction. Even if jurisdiction were lacking, *Travelers v. Bailey* is controlling to bar Petitioner's attack. *See Travelers v. Bailey, 129* S. Ct. at 2206 ("[T]his sort of collateral attack cannot be squared with *res judicata* . . . .").

The fact that Respondent commenced the instant proceedings by reopening the chapter 13 case in order to bring his proceeding to reconfirm the discharge of his student loan debt does not change the impermissible nature of Petitioner's attack on the confirmation order. *See id.* at 2206 n.7 ("Respondents point out that it is *Travelers*, not they, who moved the Bankruptcy Court to enforce the 1986 Orders. But who began the present proceedings has no bearing on the application of *res judicata* . . . .."). Based on a straightforward application of *Travelers v. Bailey*, Petitioner's post-confirmation attack on the confirmation order is barred by the doctrine of *res judicata*.

B. The Finality of Confirmed Plans Ensures the Efficient Administration of the Bankruptcy Process

The finality of confirmed plans and the prohibition on their collateral attack reflects a strong policy in favor of bringing an end to litigation. *See Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) ("[T]he practical concern with providing an end to litigation

justifies a rule preventing collateral attack on subject-matter jurisdiction"); *Stoll v. Gottlieb*, 305 U.S. at 172 ("It is just as important that there should be a place to end as that there should be a place to begin litigation."); *see also Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. at 401 (overturning Ninth Circuit anti-trust decision for failure to apply *res judicata* and noting that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts . . . .") (citing *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917) (internal quotation marks omitted)).

The finality of confirmed plans is just as important in chapter 13 cases as it is in epic asbestos cases like that at issue in *Travelers v. Bailey*. The sound administration of the bankruptcy law requires that the provisions of plans of reorganization and for debt adjustment be immune from challenge once the plan has been confirmed and the appeal period has expired. When such plans have been confirmed without objection, the debtor and creditors must be able to rely on their finality. Confirmation orders are at the heart of reorganization and debt adjustment bankruptcy cases, and the bankruptcy system could not function if a confirmation order could be upset in a later proceeding. Credit is extended to the reorganized debtor and other relationships are formed in reliance on the finality of confirmation orders. Parties to debt adjustment and reorganization cases must be confident that their conduct in reliance on court-ordered confirmation will not be undercut by later attacks on the confirmed plan.

POINT II

EVEN IF *RES JUDICATA* WERE HELD NOT TO BAR AN ATTACK ON A PROVISION OF A CONFIRMATION ORDER FOR LACK OF JURISDICTION OR SUBSTANTIVE POWER OF A BANKRUPTCY COURT, THE STUDENT LOAN PROVISIONS AND F. R. BANKR. P. 7001(6) ARE NON-JURISDICTIONAL AND DO NOT VOID THE ORDER. A CREDITOR FORFEITS NON-JURISDICTIONAL OBJECTIONS BY NOT RAISING THEM AT THE CONFIRMATION STAGE, AND THUS CANNOT RAISE THEM THEREAFTER

Petitioner contends that the order providing for the discharge of Respondent's student loan debt is void. Petr's Br. 31-32. To support its "voidness" claim, Petitioner asserts that the bankruptcy court lacked the power to enter a confirmation order with a provision for the discharge of student loan debt in contravention of §§ 523(a)(8) and 1328(a)(2) and F. R. Bankr. P. 7001(6). As demonstrated in Point I, *res judicata* bars a challenge to a confirmation order for lack of subject matter jurisdiction or substantive power of the bankruptcy court. Because a confirmation order is made fully effective by the doctrine of *res judicata* despite a lack of subject matter jurisdiction, it obviously cannot be "void." Moreover, if a collateral attack upon a confirmation order cannot be based on a claimed lack of subject matter jurisdiction, then such an attack surely cannot be sustained on the basis of non-jurisdictional errors of law in the issuance of such an order. In that regard, §§ 523(a)(8) and 1328(a)(2) and F. R. Bankr. P. 7001(6) are non-jurisdictional in nature. They are

substantive and procedural bankruptcy law provisions, noncompliance with which does not render an order void. It is fundamental that the remedy to correct an error of law is to object and appeal if necessary.

Title 28 of the United States Code provides the bankruptcy courts, by referral from the district courts, with jurisdiction to enter confirmation orders and grant discharges. 28 U.S.C. § 157(a) and § 1334(b). Sections 523(a)(8) and 1328(a)(2) do not limit the scope of the bankruptcy court's jurisdiction. Those statutes are not jurisdictional under the governing test provided by the Court in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). To be jurisdictional under the *Arbaugh* test, a statute must itself clearly manifest Congressional intent to implicate the subject matter jurisdiction of the court. Furthermore, F. R. Bankr. P. 7001(6) is a non-jurisdictional claims processing rule under the Court's decision in *Kontrick v. Ryan*, 540 U.S. 443 (2004).

In the present case, the bankruptcy court had jurisdiction to enter a confirmation order, including its arguably erroneous provision for the discharge of student loan debt. Neither the Student Loan Provisions nor F. R. Bankr. P. 7001(6) abrogate that jurisdiction. Because the bankruptcy court had subject matter jurisdiction to issue the confirmation order, that order cannot be considered to be void, and thus is not subject to an attack predicated on F. R. Civ. P. 60(b)(4). Any interest Petitioner had in avoiding the provision for the discharge of its claim set forth in the confirmed plan is overridden by the need for finality and repose expressed in the doctrine of *res judicata*, as well as by § 1327 of the Bankruptcy

Code and the Court's decisions in *Kontrick v. Ryan* and *Arbaugh*.

A. The Student Loan Provisions of §§ 523(a)(8) and 1328(a)(2) Are Not Jurisdictional In Light of the "Readily Administrable Bright Line" Test Set Forth In *Arbaugh v. Y & H Corp.*, Requiring That To Be Jurisdictional A Statute Must, By Its Own Text, Clearly Evidence Congress' Intent To Implicate the Bankruptcy Court's Subject Matter Jurisdiction

Sections 523(a)(8) and 1328(a)(2) of the Bankruptcy Code are not jurisdictional under the test delineated by the Court in *Arbaugh v. Y & H Corp.*, 546 U.S. at 515-516, as applied by the Eleventh Circuit in *In re Trusted Net Media Holdings*, 550 F.3d 1035, 1039 (11th Cir. 2008). In determining the jurisdictional nature of a statute, the Court instructed the lower courts in the following manner:

> If the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character.

Arbaugh, 546 U.S. 500, 515-516 (emphasis added) (citations omitted). The Court has called this approach a "readily administrable bright line" test. *Id.* at 516.

Petitioner's argument that the bankruptcy court lacked jurisdiction to confirm a plan for the discharge of student loan debt, is flawed. It is predi-

cated on Petitioner's erroneous reliance on cases which pre-date *Arbaugh*, except for one case, *In re Mersmann*, 505 F.3d 1033 (10th Cir. 2007), which failed to apply or even cite *Arbaugh*. *See* Petr's Br. 31-32. Instead, under the "readily administrable bright line" test, the Student Loan Provisions are not jurisdictional because Congress did not "clearly state" that they were jurisdictional in nature.

A brief discussion of the jurisdiction of bankruptcy courts is warranted in order to fully understand the scope of their power. Similar to the other provisions in the Bankruptcy Code, §§ 523(a)(8) and 1328(a)(2) are substantive law provisions for bankruptcy cases. However, the subject matter jurisdiction of the bankruptcy courts is governed by 28 U.S.C. § 1334, not by the Bankruptcy Code codified by Title 11. *In re Trusted Net Media Holdings*, 550 F.3d at 1039 (citing *Kontrick v. Ryan*, 540 U.S. at 453). Title 28 provides that the "district courts shall have original and exclusive jurisdiction of all *cases* under title 11 [Bankruptcy Code]," and "original but not exclusive jurisdiction of all civil *proceedings* arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a)-(b) (emphasis added)). Pursuant to §§ 151 and 157 of Title 28, bankruptcy court jurisdiction to adjudicate "core proceedings" exists by reference from the district courts to the bankruptcy judges for the district, including "core" jurisdiction for "confirmations of plans" and "objections to discharges." 28 U.S.C. § 157(b)(2)(J), (L). The Student Loan Provisions and F. R. Bankr. P. 7001(6), however, do not abrogate such jurisdiction of the bankruptcy courts because the "clearly states" requirement of *Arbaugh* is absent from those provisions. Indeed, those provisions contain *no* language suggesting that Congress

intended them to be jurisdictional. They thus are not jurisdictional in nature.

The issue in *Arbaugh* was whether Title VII's requirements that an employer have fifteen or more employees affected subject matter jurisdiction or, instead, related only to the substantive adequacy of a Title VII plaintiff's claim for relief, and thus could not be raised for the first time post-trial. *Arbaugh*, 546 U.S. at 503-04. The Court held that "the threshold number of employees for application of Title VII is an *element* of a plaintiff's claim for relief, not a jurisdictional issue." *Id.* at 515 (emphasis added). The Court reasoned that the "15-employee threshold" requirement did not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 510 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). Therefore, defendant forfeited his right to object on the basis of this defense and could not raise the issue after the entry of judgment. *Arbaugh*, 546 U.S. at 510.

Following the Supreme Court's decision in *Arbaugh*, the Eleventh Circuit, in *Trusted Net Media Holdings*, followed the "readily administrable bright line" test to determine whether provisions in the Bankruptcy Code are jurisdictional. The court in *In re Trusted Net Media Holdings* considered whether the number of creditors and the amounts of claims of creditors required to file an involuntary petition under § 303(b) was jurisdictional or were elements simply constituting " 'substantive matters which must be proved or waived for petitioning creditors to prevail in involuntary proceedings.' " *In re Trusted Net Media Holdings*, 550 F.3d at 1041 (quoting *Rubin v. Belo Broad. Corp.*, 769 F.2d 611, 614 n.

3 (9th Cir. 1985)). The Court held that § 303(b) is not jurisdictional because Congress did not include jurisdictional language in the statute and that there was no congressional intent to implicate the bankruptcy court's subject matter jurisdiction. *In re Trusted Net Media Holdings*, 550 F.3d at 1043. Further, § 303(b) never makes an explicit or implicit reference to its requirements being jurisdictional and never used the word "jurisdiction." *Id.* Rather, the Court explained that the Bankruptcy Code provision at issue merely states that a case "is commenced against a person by the filing with the bankruptcy court of a petition under chapter 7 or 11" by the requisite number of persons holding the requisite claims. *Id.*

In sum, under the reasoning set forth in *In re Trusted Net Media Holdings*, which applied the *Arbaugh* test, the Student Loan Provisions are not jurisdictional for a number of reasons. First, Congress did not "clearly state" any words constituting jurisdictional language in §§ 523(a)(8) and 1328(a)(2). Further, under *Trusted Net*'s analysis, the "undue hardship" requirement in the Student Loan Provisions is an *element* that merely relates to substantive matters which must be proved, and an objection based on a lack of such proof is forfeited by a failure to make it at the confirmation stage. *Id.* at 1041. The Bankruptcy Code creates the substantive rights and obligations of both debtors and creditors, and in this case, Petitioner *forfeited its rights* under the Student Loan Provisions. *See, e.g., In re Trusted Net Media Holdings*, 550 F.3d at 1041; *see also* Point II. B *infra*.

Moreover, *In re Trusted Net Media Holdings* is not cited in Petitioner's brief even though it is a Cir-

cuit Court case that applies the Court's test in *Arbaugh*, and a leading treatise states that the "better view" is that Bankruptcy Code provisions are not jurisdictional. *See* 5 COLLIER ON BANKRUPTCY, ¶ 546.02[4] (Allen N. Resnick et al. 15th ed. rev. 2006) (stating that the "better view" is that § 546(a) is non-jurisdictional); 2 COLLIER ON BANKRUPTCY, ¶ 303.08[2] (stating that the better argument is that § 303(b) may be waived; and ¶ 303.02 (stating that § 109(a)'s requirements for a person to be a debtor under the Bankruptcy Code, may be waived) (Allen N. Resnick et al. 16th ed. (2009). Further, Petitioner's brief does not even mention *Arbaugh*.

In enacting the Student Loan Provisions, Congress merely indicated that in order for a student debt to be dischargeable, undue hardship should be proven, and that *a manner* in which it is demonstrated is by commencing an adversary proceeding. However, there is no language in the Bankruptcy Code which makes such a procedure jurisdictional and mandatory, nor anything which precludes a forfeiture of the right to object based on the failure to bring an adversary proceeding. *See* 4 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, § 346.1, at 346-33 (3d ed. 2000 & Supp. 2004) (citing *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 453-54 (2004)).

It is clear that the Student Loan Provisions are not jurisdictional, and Petitioner forfeited its rights thereunder by not asserting them at the confirmation stage.

B. F. R. Bankr. P. 7001(6) is a Non-Jurisdictional Claims Processing Rule Under the Court's Decision in *Kontrick v. Ryan*

Nothing in F. R. Bankr. P. 7001(6) implicates the jurisdiction of the bankruptcy courts. Non-compli-

ance with Rule 7001(6) does not void a judgment or order. As discussed in Section II. A, Congress conferred jurisdiction on the bankruptcy courts over proceedings for confirmation of plans and discharges of debts under §§ 1334(b), 157(b)(1)(J),(L) of Title 28 of the United States Code. F. R. Bankr. P. 9030 prevents the Bankruptcy Rules from being construed to expand or limit the jurisdiction of the bankruptcy courts. The confirmation order for the discharge of Petitioner's student loan debt was not void because entry of the order was within the subject-matter jurisdiction of the bankruptcy court as prescribed by Congress.

The Court recently underscored the non-jurisdictional nature of the Bankruptcy Rules in *Kontrick v. Ryan*, 540 U.S. at 447. The Court there noted that courts have been "less than meticulous" in their characterization of rules as "jurisdictional," and reaffirmed that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Id.* at 452-53. Procedural rules promulgated by the Court for bankruptcy cases, on the other hand, are claims processing rules which "shall not be construed to extend or limit the jurisdiction of the courts." *Id.* at 453-54 (quoting F. R. Bankr. P. 9030). These claims processing rules, "even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick v. Ryan*, *Id.* at 444-45. The Court concluded that F. R. Bankr. P. 4004 was a non-jurisdictional claims-processing rule "adopted by the Court for the orderly transaction of its business . . . ." 540 U.S. at 447, 454; *see also Schacht v. United States*, 398 U.S. 58, 64 (1970) ("[T]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional").

Petitioner's argument that F. R. Bankr. P. 7001(6) requires an adversary proceeding to discharge student loans under § 523(a)(8) fails to account for the claims-processing nature of procedural rules. An adversary proceeding is not required by statute or the Constitution for discharge of student loan debts. *Hood*, 541 U.S. at 453-54. To hold that Rule 7001(6) is a jurisdictional requirement, would require the Court to ignore the scope of the authority conferred by Congress by 28 U.S.C. § 2075, which only authorizes the promulgation of rules of "practice and procedure" for bankruptcy cases. It would also require the Court to disregard the plain language of F. R. Bankr. P. 9030, which precludes interpreting Rule 7001(6) as a limitation on the jurisdiction of the bankruptcy courts.

Petitioner failed to object to Respondent's chapter 13 plan despite receiving notice of the plan confirmation hearing and notice of the treatment of its claim under the plan. Under *Kontrick v. Ryan*, by this failure to object, Petitioner forfeited its right to a determination of undue hardship in an adversary proceeding under F. R. Bankr. P. 7001(6). Because Rule 7001(6) is non-jurisdictional in nature, there is no basis for a claim that noncompliance with it voided the confirmation order and discharge.

C. Concepts of Finality and Repose Dictate that a Creditor Who Fails To Object Prior to Confirmation of a Chapter 13 Plan Forfeits Its Right To Later Object That the Plan Was Erroneously Confirmed

The Bankruptcy Code and Bankruptcy Rules governing objections to confirmation of a chapter 13 plan act as claims-processing limitations. *See*

Bankruptcy Code § 1324; F. R. Bankr. P. 2002(b), 3015(d), (f), 9014. Section 1324(a) provides that, "after notice, the court shall hold a hearing on confirmation of the plan." A creditor, as a party in interest under § 1324, may object to the confirmation. F. R. Bankr. P. 2002 requires that "the debtor, the trustee, all creditors and indenture trustees [receive] not less than 25 days notice by mail of the time fixed . . . for filing objections and the hearing to consider confirmation of a . . . chapter 13 plan." F. R. Bankr. P. 3015(d) provides that "[a]n objection to confirmation of a plan shall be filed . . . *before* confirmation of the plan." (emphasis added). F. R. Bankr. P. 2002(b) and 3015(f) are claims-processing rules. *See Kontrick v. Ryan*, 540 U.S. at 454 ("In short, the filing deadlines proscribed in [the] Bankruptcy Rules . . . are claims-processing rules.").

In the case at bar, compliance with this requirement was exceeded because Petitioner received more than the required 25 days notice that it had a right to be heard. Petitioner did not object before the confirmation of Respondent's plan, nor take an appeal from the confirmation order.

Petitioner forfeited its right to object to the confirmed plan once it was confirmed and the time to appeal from the confirmation order expired without an appeal having been taken. This Court has held that a creditor who fails to assert its rights within the time constraints prescribed by the Bankruptcy Rules forfeits its right to later argue that the bankruptcy court's decision was erroneous. *See Kontrick v. Ryan*, 540 U.S. at 459 ("Ordinarily, under the Bankruptcy Rules as under the Civil Rules, a defense is lost if it is not [raised]."); *see also Eber-*

hart v. United States, 546 U.S. 12, 19 (2006) ("[C]laims-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them."). Here, Petitioner failed to file any objection to the confirmation of Respondent's chapter 13 plan or to appeal the confirmation order. Therefore, Petitioner forfeited its objection that §§ 523(a)(8) and 1328(a)(2) prohibit a plan from discharging student loan debt without a determination of undue hardship. Petitioner likewise forfeited its rights under F. R. Bankr. P. 7001(6).

Finally, under the principle of repose, this Court should recognize the finality of confirmation of plans of reorganization and of debt adjustment. "Experience has disclosed, that for the security of rights, and the preservation of the repose of society, a limit must be imposed upon the faculties for litigation." *Washington, A. & G. Steam Packet Co. v. Sickles*, 65 U.S. 333, 343 (1860); CHARLES A. WRIGHT, ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE, § 4403 (3d ed. 1998) ("Repose is the most important product of *res judicata*."). The time limitation provision found in F. R. Bankr. P. 2002 "serves the same 'basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.' " *Young v. United States*, 535 U.S. 42, 48 (2002); *see also El Paso Natural Gas Co. v. Neztsosie*, 541 U.S. 473, 481-82 (1999) ("[Statutes of limitations are] not there to penalize parties who fail to assert their rights, but [are] meant to protect institutional interests in the orderly functioning of the judicial system . . . and encouraging repose . . . ."). As stated by the Court, there is "historic wisdom in the value of

repose." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 219 (2005).

POINT III

A PROVISION OF A CONFIRMED CHAPTER 13 PLAN THAT DISCHARGES STUDENT LOAN DEBT IS BINDING AND EFFECTIVE BY VIRTUE OF BANKRUPTCY CODE § 1327(a) WHERE THE CREDITOR HOLDING THE CLAIM (1) RECEIVED ADEQUATE NOTICE OF THE PROPOSED PLAN AND THE PROCEEDING FOR ITS CONFIRMATION, AND (2) CHOSE NOT TO OBJECT

Bankruptcy Code § 1327(a) provides that "[t]he provisions of a confirmed plan bind . . . *each creditor*, whether or not the claim of such creditor is provided for by the plan, and *whether or not such creditor has objected* to, has accepted, or has rejected the plan."[4] (emphasis added). The question is whether the binding effect given by Congress to a confirmation order will be applied as written, or instead, narrowed by implying an exception where the confirmed plan is not in accord with §§ 523(a)(8) and 1328(a)(2).

This Court has often stated that when "the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (cit-

[4] Similar provisions that bind creditors to confirmed plans are set forth in chapters 9, 11, and 12. *See* Bankruptcy Code §§ 944(a), 1141(a), 1227(a).

ing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

There is no room in the plain text of § 1327(a) to limit or restrict the binding effect of a confirmed chapter 13 plan by engrafting an exception for plans that discharge student loan obligations without a specific § 523(a)(8) undue hardship determination. Congress explicitly provided in § 1327(a) that confirmed plans would be binding on creditors, and the clear language of the statute bars post-confirmation objections to all provisions in a confirmed plan.[5]

Congress could not have intended § 1327(a) to be read other than in accordance with its plain text and to upset the finality of confirmation orders issued under any of the chapters of the Bankruptcy Code. In that provision, Congress made its intent clear and unmistakable that all provisions of a confirmed plan bind "each creditor," including creditors who have not "objected." Congress emphasized the extent of § 1327(a)'s binding effect on each creditor by providing that each is bound by the plan's provisions, even if the creditor has "rejected" the plan. Congress' purpose to preclude all post-confirmation attacks on provisions of confirmed plans, as unambiguously written into § 1327(a), could not be more clear.

No exception to the binding effect of all provisions of a confirmed plan was written into § 1327(a). The binding nature of confirmed chapter 13 plans follows the structure under Chapter XII of the former Bankruptcy Act, which also stated that a con-

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[5] Bankruptcy Code § 1330 authorizes a prompt motion to revoke confirmation, but only for fraud in procuring the confirmation order. No such motion or claim was made in this case.

firmed plan would be binding upon all creditors. *See* Pub. L. No. 696, ch. 575, § 657, 52 Stat. 840, 935 (1938) (repealed 1978) ("Upon confirmation of a plan, the plan and its provisions shall be binding upon the debtor and upon all creditors of the debtor, whether or not they are affected by the plan or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed or are allowable."). Congress, however, strengthened the pre-Code provision by adding to § 1327(a) language that expressly makes a confirmed plan binding on creditors who have not "objected."

Congress could have provided an explicit exception in § 1327(a). It did not do so. The language found in other chapters of the Bankruptcy Code illuminates that Congress knew how to create an exception in § 1327(a) if it wished to do so for student loan debts. For example, § 1141(a) provides that a plan of confirmation shall bind all creditors "[e]xcept as provided in subsections (d)(2) and (d)(3) of this section." Section 1141(d)(2) explicitly states, "[a] discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title," which includes student loan debt where there has been no determination of undue hardship. Similarly, § 1227(a) binds creditors to the terms of a confirmed plan "[e]xcept as provided in section 1228(a) of this title." Section 1228(a) explicitly prohibits a debtor from discharging a "debt of the kind specified in section 523(a) of this title." Congress knew how to write exceptions into those statutes, but did not provide any exception in § 1327(a) for student loan claims. Such an exception should not be grafted onto § 1327(a).

The Court should not find an exception to the binding effect of a confirmed plan that provides for the discharge of student loan debt, because that would invite student loan creditors to defer objecting to a plan as not confirmable until after the creditor received the benefit of the payments provided for by the plan, as the Petitioner did in this case. Creditors cannot have it both ways. They should not be allowed to accept the benefits of a plan only to attack its validity thereafter. Moreover, if the Court allows such post-confirmation attacks on chapter 13 plans, creditors would be encouraged to collect payments under a chapter 9, 11, or 12 plan and allowed to upset confirmed plans later on the basis of claimed legal errors in granting confirmation. Congress could not have intended § 1327(a) to be benign. *See* 8 COLLIER ON BANKRUPTCY, ¶ 1327.02[1][c], at 1327-8 (Allen N. Resnick et al. eds., 15th ed. rev. 2006) ("[Reading an exception for section 523 violations into section 1327(a)] would render any chapter 9, 11, 12 or 13 plan subject to attack after confirmation, and even after completion, for a violation of notice or service rules, in contravention of section 1327(a)."). A creditor should not be allowed to wait until an otherwise non-confirmable plan has been completed by payment, and then for the first time to pursue collection efforts and also to bring proceedings to undo confirmation.

To permit post-confirmation attacks on confirmation orders could result in voiding confirmation orders containing a variety of provisions that may be at odds with the Bankruptcy Code, but which are nevertheless found in plans of reorganization confirmed in cases under chapters 9, 11 and 12. *See e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005) (upholding a confirmed chapter 11

plan that enjoined suits against third parties, which violated § 524(e)); *In re American Preferred Prescriptions, Inc.*, 255 F.3d 87, 94-95 (2d Cir. 2001) (sustaining the post-confirmation appointment of a chapter 11 trustee, although § 1104(a) authorizes such appointment only before confirmation of a plan); *In re Penn-Dixie Industries, Inc.*, 32 B.R. 173, 177-79 (Bankr. S.D.N.Y. 1983) (upholding a chapter 11 plan that failed to properly classify tax debts, as required by § 1129(a)(9)); *In re County of Orange*, 219 B.R. 543, 566-67 (Bankr. C.D. Cal. 1997) (upholding a chapter 9 plan which subordinated a creditor's claim, in violation of § 1123(a)(4) as incorporated into chapter 9 by § 901(a)); *In re Watkins*, 240 B.R. 735 (Bankr. C.D. Ill. 1999) (upholding a chapter 12 plan that treated a junior lien holder's claim only as an unsecured claim, in violation of § 1225(a)(5)).

The sound administration of bankruptcy cases requires that provisions of plans of reorganization and of debt adjustment under the various chapters not be subject to attack by a creditor who has not objected to confirmation of the plan or appealed the confirmation order. The debtor and creditors must be able to rely on the confirmed plan and be confident that their post-confirmation conduct will not be undercut by post-confirmation attacks on the confirmed plan. Credit is extended to the reorganized debtor and other relationships are entered into in reliance of the finality of confirmation orders. Such orders are at the heart of reorganization and debt relief cases, and the bankruptcy laws could not function if they could be upset in a later proceeding, whether initiated in another proceeding in a different court, or in a later proceeding in the same bankruptcy case. Section 1327(a) should be applied

as written, rather than interpreting it in a way that could undercut reorganization under all of the chapters of the Bankruptcy Code.

The interest of the debtor and creditors in finality of confirmed plans is paramount. *See Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 891 F.2d 159, 162 (7th Cir. 1989) (citing cases). Finality is an essential element of any successful reorganization under the Bankruptcy Code, as evidenced by provisions in all chapters that a plan of reorganization is binding on all creditors.[6] Without finality, confirmation is meaningless. Indeed, in chapter 11 cases, in which confirmation is put to a vote, creditors would be unlikely to accept a plan, knowing that it could be undone later.

The binding nature of § 1327(a) is further supported by the fundamental policy of equitable mootness. When a party fails or neglects to diligently pursue its available remedies, the doctrine of equitable mootness precludes a party from obtaining

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[6] Bankruptcy Code §§ 944(a)(3), 1141(a), 1227(a), 1327(a). *See* Bankruptcy Code § 944(a)(3) ("The provisions of a confirmed plan bind the debtor and any creditor, whether or not . . . such creditor has accepted the plan"); Bankruptcy Code § 1141(a) (with exceptions, "the provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not the claim or interest of such creditor . . . has accepted the plan"); Bankruptcy Code § 1227(a) ("the provisions of a confirmed plan bind the debtor [and] each creditor. . . whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor . . . has accepted, or has rejected the plan"); Bankruptcy Code § 1327(a) ("The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.").

appellate review. *See, e.g., In re Continental Airlines*, 91 F.3d 553, 559 n.1 (3d Cir. 1996); *In re Public Serv. Co.*, 963 F.2d 469, 472 (1st Cir. 1992); *In re Roberts Farms*, 652 F.2d 793, 798 (9th Cir. 1981). The passage of time and changes in parties' positions after a confirmation order has been issued are basic considerations that preclude efforts to overturn such an order. For these reasons, the doctrine of equitable mootness has developed in bankruptcy cases to dismiss appeals where relief could still be fashioned after substantial consummation of a plan of reorganization, but where it would be inequitable to do so. Several factors are considered in deciding whether an order has become equitably moot, including "the public policy of affording finality to bankruptcy judgments." *In re Continental Airlines, Inc.*, 91 F.3d at 560. As stated by a commentator, who is one of the *Amici* professors on this brief, the doctrine of equitable mootness promotes "finality and reliance upon the orders of a bankruptcy court regarding matters such as . . . plan confirmation." George W. Kuney, *Slipping Into Mootness*, 2007 ANN. SURV. BANKR. LAW, ART 9, 267 at 279-80. Analogous to this long-standing doctrine, § 1327(a) binds parties who do not exercise their rights to object to confirmation or appeal a confirmation order.

CONCLUSION

For the foregoing reasons, the Court should sustain the confirmation order and discharge in this case, either on the basis of the doctrine of *res judicata*, or by ruling that § 1327(a) should be applied as written. The *Amici* thus urge the Court to affirm the order below.

Respectfully submitted,

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Dated: October 16, 2009

AMICUS CURIAE BRIEF

No. 08-1134

IN THE

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is the Macklin Fleming Visiting Lecturer in Law at the Yale Law School where he teaches courses on bankruptcy law, domestic and international business reorganizations, commercial transactions, secured transactions, and argument and reason. He began teaching at Yale in 1990 and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author to COLLIER ON BANKRUPTCY, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008); *Travelers*

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. Copies of petitioner's and respondent's consents are filed herewith.

Cas. & Sur. Co. v. Pacific Gas & Elec. Co., 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). During this term, he will be arguing *Schwab v. Reilly*, No. 08-538, and *Milavetz, Gallop & Milavetz, P.A. v. United States*, Nos. 08-1119, 08-1225. He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court several amicus briefs in bankruptcy cases, including *Howard Delivery Serv., Inc. v. Zurich American Ins., Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The undersigned is deeply interested in the subject of bankruptcy law, and has written, taught, and lectured on the subject of bankruptcy plans, the proper treatment of claims under plans, and the finality of orders confirming a

plan. The purpose of this brief is to address matters that bear on the Court's determination of a critically important issue of bankruptcy law: whether a creditor who receives notice of a debtor's bankruptcy case, who fails to object to the proposed treatment of its claim in the debtor's plan, and who then receives payments under the plan following the plan's confirmation, may subsequently ignore the plan and violate the debtor's discharge on the basis of an alleged defect in the plan that the creditor could and should have raised prior to the plan's confirmation.

Bankruptcy courts confirm tens of thousands of plans each year. Creditors routinely decline to object to these plans even though they may have a meritorious objection, in many instances because they conclude that the plan offers the best means of receiving the highest recovery on their claims. In the absence of a timely and successful appeal from an order confirming a plan, confirmation of the plan results in a final judgment that is binding on all parties. Debtors rely on this finality, as do others who interact with debtors following their emergence from bankruptcy.

In this context, petitioners advocate an untenable rule that would essentially defeat the plan process: namely, that they need not assert any objection they may have to a plan prior to

the plan's confirmation, may receive payments from the debtor for years in accordance with the plan, and then, after the debtor believes he or she is finished making all payments, assert their objection in order to avoid the debtor's discharge and obtain perhaps even greater payment. If this were the rule, our bankruptcy system would collapse of its own weight because one of its most essential underpinnings – finality – would be effectively eroded. But this is not the rule, as established by several provisions of the governing Bankruptcy Code and the precedents of this Court. The undersigned presents this brief to address these important matters.

STATEMENT

Between 1988 and 1989, respondent Francisco J. Espinosa ("Espinosa") obtained $13,250 in student loans. Joint Appendix ("JA") 16. He apparently hoped that the educational training that these loans funded would generate better employment opportunities. Unfortunately, that did not occur, and he found himself unable to bear the burden of his debt. On December 7, 1992, he commenced a chapter 13 bankruptcy case in the United States Bankruptcy Court for the District of Arizona. JA 5.

The Bankruptcy Code requires each chapter 13 debtor to propose a plan. 11 U.S.C. §

1321.[2] The purpose of the plan is to describe the debtor's proposed treatment of his or her debts, and the plan must provide that the debtor will dedicate future earnings or other income as necessary for the payment of claims as set forth in the plan. 11 U.S.C. § 1322(a)(1). Although creditors are not entitled to vote on a chapter 13 plan, any creditor may insist that the debtor either propose to pay the creditor's claim in full, or, if the debtor cannot pay claims in full, at least dedicate all of the debtor's "disposable income" to the payment of claims for not less than three years. 11 U.S.C. § 1325(b)(1). As is relevant here, the term "disposable income" is defined to mean the amount of the debtor's income that is not reasonably necessary for the debtor's maintenance and support. 11 U.S.C. § 1325(b)(2)(A).

At the time Espinosa commenced his bankruptcy case, his student loans were held by petitioner United Student Aid Funds, Inc. ("Funds"). JA 16. Espinosa's chapter 13 plan (the "Plan") provided for the payment in full of the original principal amount of these loans. JA 26. To accomplish this, Espinosa proposed to dedicate slightly more than his monthly disposable income to pay off this amount over time. JA 22-23.

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[2] References to the Bankruptcy Code are to the provisions of the Code in effect at the time of Espinosa's bankruptcy filing in 1992. Relevant provisions are reproduced in the statutory appendix accompanying this brief.

Further, the plan obligated him to make his monthly payments for a five-year period, rather than the standard three-year term. *See* 11 U.S.C. § 1322(c) (providing that a plan ordinarily cannot propose a payment period greater than three years, and absolutely cannot propose a payment period in excess of five years). In other words, Espinosa proposed to pay the Funds *more* than the maximum monthly amount a creditor may require from the debtor in a chapter 13 case, and to make his payments for the maximum amount of time that chapter 13 permits.

Funds filed a proof of claim asserting that the amount owed under the loans was approximately $17,832, a sum that exceeded the principal balance of the loans by roughly $4,582. JA 35. The Plan specifically provided, however, that "[t]he amounts claimed by the [Funds] for capitalized interest, penalties, and fees shall not be paid for the reasons that the same are penalties and not provided for in the loan agreement between the Debtor and the lender." JA 26. The Plan further provided that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." JA 26. Following the resolution of a minor objection by the trustee, the

bankruptcy court issued an order confirming the Plan on May 6, 1993. JA 42-43.[3]

Funds failed to object to the Plan, either before or after the bankruptcy court entered its confirmation order. Pet. App. 5-6. Indeed, Funds failed to object to the Plan even after the trustee specifically notified Funds that it would receive less than the amount set forth in its proof of claim under the provisions of the Plan. JA 44-45.

By operation of law, after a debtor completes making payments under his chapter 13 plan, the debtor is entitled to a discharge. 11 U.S.C. § 1328. The effect of the discharge is to release the debtor from personal liability for most pre-petition monetary obligations, and the discharge acts as a type of injunction against further debt collection activity on discharged debts. 11 U.S.C. § 1328(c); *see also* 11 U.S.C. § 524. The scope of a discharge is subject to certain exceptions. 11 U.S.C. §§ 523, 1328(c). Student loans insured or guaranteed by a governmental unit are among the exceptions, "unless...excepting such debt from discharge...will impose an undue hardship on the

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[3] In chapter 13 cases, a trustee is appointed to supervise the process and administer the confirmed plan. 11 U.S.C. § 1302.

debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8).

A proceeding to declare the dischargeability of a particular debt under section 523, including a debt for a student loan that poses an undue hardship, is customarily pursued as an "adversary proceeding" commenced by either the debtor or the creditor with the filing of a complaint. Fed. R. Bankr. P. 7001(6); *see also* Fed. R. Bankr. P. 4007. In this case, Espinosa did not commence an adversary proceeding or file a motion specifically seeking an undue hardship determination. Instead, as noted, Espinosa provided in his Plan for the full payment of the principal amounts due on his student loans, and provided for the discharge of any other amounts related to the loans. JA 26. In addition, Espinosa proposed to devote more than his available "disposable income" to fund payment of this debt. In other words, Espinosa essentially offered Funds a compromise: he would devote all of his disposable income (and then some) to pay his student loan debt for five years, but beyond that the debt would be extinguished.

As noted, Funds did not object to this treatment – perhaps because it believed it was a good deal under the circumstances – and the bankruptcy court entered an order confirming the Plan. On May 30, 1997, following Espinosa's successful completion of all payments required

under his Plan, including his payment in full of the principal amounts due on his student loans, the bankruptcy court granted Espinosa his discharge. JA 46.[4]

By operation of law, "[t]he provisions of a confirmed plan bind the debtor and each creditor" regardless of whether "the claim of such creditor is provided for by the plan" and regardless of whether "such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). Likewise, following confirmation of a plan, a party in interest may seek to revoke confirmation within 180 days "after the date of the entry of an order of confirmation" and only "if such order was procured by fraud." 11 U.S.C. § 1330(a). At no time during the 180 days following confirmation of Espinosa's Plan did Funds seek to revoke the order confirming the Plan. Likewise, Funds did not appeal the order confirming the Plan.

Three years after the bankruptcy court granted Espinosa's discharge, and eight years after the Plan was confirmed, Funds (in conjunc-

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[4] While a clerical error in the bankruptcy court's order erroneously included an exception to discharge for any debt "for a student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8)," that error was acknowledged and corrected by the bankruptcy court on remand from the Ninth Circuit. JA 46, 48.

tion with the Education Department) began intercepting Espinosa's income tax refunds in an effort to obtain the unpaid portion of its claim. Pet. App. 6. Thereafter, Espinosa filed a motion with the bankruptcy court requesting an order holding Funds in contempt for violating the discharge injunction. Pet. App. 6.

The bankruptcy court ruled in favor of Espinosa. Pet. App. 7. On appeal, the district court reversed, ruling that the confirmation order was void for lack of due process. Pet. App. 7. On appeal from the district court, the Ninth Circuit reversed and remanded the case to the bankruptcy court for the resolution of a clerical error.[5] Following the bankruptcy court's resolution of the error, the Ninth Circuit reversed the district court, explaining that "student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, after receiving notice of the proposed plan." Pet. App. 26.

SUMMARY OF THE ARGUMENT

Sections 523(a)(8) and 1328(a)(2) provide that student loans are dischargeable only upon a showing of "undue hardship." In contrast, section 1327(a) provides that the provisions of a confirmed plan "bind" the debtor and creditors, and section 1330(a) provides that a confirmation

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[5] *See supra* note 4.

order may be revoked within 180 days of its entry "if...procured by fraud." Funds argues that sections 523(a)(8) and 1328(a)(2) trump the bankruptcy court's order confirming Espinosa's Plan, and that Funds' failure to object to the Plan is therefore of no effect. But consistent with sections 1327(a) and 1330(a), this Court has repeatedly upheld the enforceability of a bankruptcy court's orders once they have become final, including orders confirming bankruptcy plans, and has turned away subsequent attempts to challenge the enforceability of those orders for procedural defects or substantive deficiencies that could have been raised earlier. *See, e.g., Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2198 (2009); *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

Consistent with the Court's precedents, as well as the text, logic, history, and purpose of the Bankruptcy Code, the better view is that sections 1327 and 1330 supply the correct rule of decision here. If a creditor with notice has grounds for objecting to a plan, including on the basis that its claim is not being treated in a manner consistent with the Code, the creditor must assert those grounds prior to confirmation, or forfeit any right to do so. A creditor with notice may not wait until after confirmation to assert an objection on the theory that the unarticu-

lated objection silently rendered the confirmation order void.

Important reliance interests are at stake, as well as interests of fundamental fairness. In proposing their plans in good faith to resolve their financial difficulties, chapter 13 debtors rely on creditors to object if, in fact, a creditor intends to oppose the debtor's proposal. Likewise, debtors rely on the finality of plans in making their payments under them, as do other persons who interact with these debtors. A creditor cannot withhold an objection to confirmation, receive payments under a confirmed plan, and then successfully assert its objection thereafter in the hope of receiving still more. Such a rule would only encourage creditors to ignore the confirmation process, and would essentially hobble the bankruptcy system and the goals that it promotes, including the debtor's fresh start. The decision of the court below should be affirmed.

A. Funds' Position Irreconcilably Conflicts with Sections 1327(a), 1330(a), and Prior Decisions of this Court.

Section 1327(a) provides that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. §

1327(a). By its plain terms, section 1327(a) thus fixes the effect of a confirmed plan.

In turn, section 1330(a) provides that, on request of a party in interest "at any time within 180 days after entry of an order of confirmation," the bankruptcy court may revoke the order if "procured by fraud." 11 U.S.C. § 1330(a). By its plain terms, section 1330(a) thus prescribes the parameters for revoking an order of confirmation.

By design, sections 1327(a) and 1330(a) inject strong rules of finality into the plan confirmation process. These rules mirror the precedents of this Court, and likewise supply the relevant rule of decision applicable in this controversy.

1. *Travelers Indemnity Co. v. Bailey*

In *Travelers Indemnity Co. v. Bailey*, the Court considered the finality of a bankruptcy court's orders barring claims against a debtor's third party insurer entered in conjunction with the debtor's confirmed chapter 11 plan. 129 S. Ct. at 2198. The case involved the Johns-Manville Corporation ("Manville"), a processor of asbestos and manufacturer of asbestos-containing products. The Travelers Indemnity Company and its affiliates ("Travelers") were Manville's primary liability insurers. In 1982, Manville filed for bankruptcy in response to a

deluge of lawsuits seeking to hold it responsible for a broad variety of asbestos-related injuries. *Id.* at 2198-99.

Manville's reorganization plan created the Manville Personal Injury Settlement Trust ("Trust") to pay asbestos claims filed against Manville, and Manville's plan provided that all such claims would be "channeled" to the Trust, leaving the reorganized Manville free from these liabilities. *Id.* at 2199. The "cornerstone" of the plan was a settlement whereby Manville's insurers, including Travelers, agreed to provide most of the initial funding for the Trust. *Id.* The settlement was made possible by a December 18, 1986 order of the bankruptcy court (the "Settlement Order") approving the settlement agreement and enjoining all persons from "commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group." *Id.* The bankruptcy court's December 22, 1986 order confirming Manville's plan incorporated the Settlement Order by reference, and both the confirmation order and the Settlement Order were affirmed by the district court and, subsequently, the court of appeals. *Id.* at 2219-20.

Over ten years later, plaintiffs filed various asbestos actions against Travelers for liability related to its provision of insurance to Man-

ville (the "Direct Actions"). *Id.* at 2200. In 2002, Travelers returned to the bankruptcy court, invoking the terms of the 1986 orders and moving to enjoin the Direct Actions. *Id.* The bankruptcy court held an evidentiary hearing, made extensive findings, and held that the Direct Actions arose out of and were related to the insurance policies, and were therefore barred under the terms of the 1986 orders. *Id.* at 2201. The district court affirmed, but the Second Circuit reversed, holding that the bankruptcy court "mistook its jurisdiction when it enjoined 'claims brought against a third-party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate,' because 'a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate.'" *Id.* at 2202. In other words, the Second Circuit concluded that the bankruptcy court lacked the authority to enjoin the actions against Travelers in the first place.

On further review, this Court reversed the Second Circuit, holding that "the 1986 Orders became final on direct review over two decades ago," and therefore "whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 and [likewise was] not properly before [this Court]." *Id.* at 2203. The Court held further that,

> where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect. . . . If it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, *see* R. Lord, *Williston on Contracts* § 30:4 (4th ed. 1999), it is all the clearer that a court should enforce a court order, a public governmental act, according to its unambiguous terms. This is all the Bankruptcy Court did.

Id. at 2204 (internal citations omitted). In addition, the Court held that, even if it found the 1986 orders to be ambiguous, "it is far from clear that respondents would be entitled to upset the Bankruptcy Court's interpretation of the 1986 Orders," because a "bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference." *Id.* at 2204 n.4. Stressing the need for finality, the Court concluded that "[a]lmost a quarter-century after the 1986 Orders were entered, the time to prune them is over." *Id.* at 2206.

The Court's decision in *Bailey* has direct bearing here. Just as the plaintiffs in *Bailey* could not ignore or avoid the bankruptcy court's

confirmation of Manville's plan or its injunction barring actions against Manville's insurers, Funds cannot ignore the bankruptcy court's confirmation of Espinosa's Plan or its order granting Espinosa his discharge following completion of his plan payments. Whatever merit Funds' objection to the discharge of its claims might have had prior to confirmation, Funds' opportunity to assert its objection has long since passed, and it cannot now upset the finality of Espinosa's Plan or the bankruptcy court's order granting Espinosa his discharge.

2. *Celotex Corp. v. Edwards*

In *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), plaintiffs sued Celotex in the federal district court, alleging asbestos-related injuries. *Id.* at 302. The district court entered a judgment against Celotex, and, to stay execution pending appeal, Celotex posted a supersedeas bond with Northbrook Property and Casualty Insurance Company (Northbrook) serving as surety. *Id.* The Fifth Circuit affirmed the judgment, rendering it "final." *Id.* On the same day, Celotex commenced a chapter 11 bankruptcy case. *Id.*

Shortly thereafter, the bankruptcy court entered an injunction pursuant to 11 U.S.C. § 105 staying all proceedings involving Celotex, including any action against Northbrook. *Id.* at 303. Ignoring the injunction, plaintiffs filed a motion with the district court seeking permission

to execute against Northbrook on the supersedeas bond pursuant to Fed. R. Civ. P. 65.1. *Id.* Celotex and Northbrook argued that the bankruptcy court's injunction applied, barring execution. *Id.* The district court disagreed, and permitted plaintiffs to execute on the bond against Northbrook. *Id.* at 304. On appeal, the Fifth Circuit affirmed, but this Court reversed. *Id.* at 305-6.

The Court began by noting the well-settled rule that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *Id.* at 306 (citation and internal quotation marks omitted) (citing *Oriel v. Russell*, 278 U.S. 358 (1929)). Plaintiffs attempted to argue that section 1334(b), vesting the bankruptcy court with jurisdiction to apply the provisions of the Bankruptcy Code, must be "harmonized" with Fed. R. Civ. P. 65.1, providing an expedited procedure for executing on supersedeas bonds. *Celotex*, 514 U.S. at 311. The Court disagreed, holding that the bankruptcy court's order trumped the procedural rule: "This Rule outlines a streamlined *procedure* for executing on bonds...Just because the Rule provides a simplified procedure for collecting on a bond, however, does not mean that such a procedure, like the more complicated procedure of a full-

fledged lawsuit, cannot be stayed by a lawfully entered injunction." *Id.* at 312.

The Court concluded that if plaintiffs desired to challenge the injunction, "they should have challenged it in the Bankruptcy Court." *Id.* at 313. Moreover, this Court explained that if the plaintiffs were dissatisfied with the bankruptcy court's decision, they should have taken a direct appeal to the district court and, if necessary, to the Eleventh Circuit. *Id.* What they could not do was "collaterally attack the Bankruptcy Court's Section 105 injunction...without seriously undercutting the orderly process of the law." *Id.*

The Court's decision in *Celotex* also has bearing here. Just as the plaintiffs in *Celotex* could not ignore the bankruptcy court's injunction and proceed to enforce their claim against the debtor's surety, Funds cannot ignore the bankruptcy court's confirmation of Espinosa's Plan and discharge order. To the extent Funds desired to challenge the Plan and its provision for the discharge of its claim, Funds was required to object to the Plan on a timely basis. If Funds were dissatisfied with the bankruptcy court's resolution of its objection, Funds could and should have taken a direct appeal to the district court or, if necessary, to the Ninth Circuit. What Funds cannot do without seriously undercutting the orderly process of the law is ignore

the bankruptcy court's discharge order, commence debt collection activities against Espinosa after Espinosa completed his payments under his Plan, and then claim that the bankruptcy court's order was void on the basis of an alleged defect that Funds could and should have asserted in the confirmation proceeding.

3. *Chicot County Drainage Dist. v. Baxter State Bank*

In *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), the bankruptcy court[6] approved the plan of reorganization of the Chicot County Drainage District ("District") canceling the bonds of Baxter State Bank ("Baxter"). *Chicot*, 308 U.S. at 373. In reliance on the bankruptcy court's jurisdiction to confirm the plan, the Reconstruction Finance Corporation ("RFC") made a loan to the District and purchased a number of the District's old bonds. *Id.* Subsequently, in an unrelated case, this Court declared unconstitutional the provisions of the Bankruptcy Act under which the bankruptcy court had approved the District's plan. *Id.* at

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[6] Under the prior bankruptcy acts, district courts were vested with the jurisdiction of bankruptcy courts and would sit as a court of bankruptcy in bankruptcy matters. *See* Act of July 1, 1898, ch. 541, § 2, 30 Stat. 545, 11 U.S.C. § 11 (repealed 1979). For clarity, the term "bankruptcy court" will be used to refer to such circumstances in this brief.

373-74. Thereafter, Baxter sought to recover on its bonds, arguing that the bankruptcy court lacked jurisdiction to cancel them owing to the unconstitutionality of the governing statutory scheme. *Id.*

Rejecting Baxter's claim, the Court stated bluntly: "We think the argument untenable." *Id.* at 376. As the Court recognized, "[t]he lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Id.* Nevertheless, "they are courts with authority . . . to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act." *Id.* The Court concluded that "[t]heir determinations of such questions, while open to direct review, may not be assailed collaterally." *Id*; *see also Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 n.13 (1982) ("The need for finality within our federal system...applies with equal force to questions of jurisdiction.") (citations omitted).

The Court's decision in *Chicot* is directly analogous. Just as the creditor in *Chicot* could not ignore the bankruptcy court's confirmation order cancelling its bonds on the belated theory that the bankruptcy court's exercise of its authority was unconstitutional, Funds cannot now

argue successfully long after the fact that the bankruptcy court's orders confirming Espinosa's Plan and granting him a discharge exceeded the court's authority. Once again, the need for finality prevails.

4. *Stoll v. Gottlieb*

Finally, in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), the bankruptcy court entered an order confirming the plan of reorganization of the debtor Ten Fifteen North Clark Building Corp. ("Ten Fifteen"). *Id.* at 169. The plan and confirmation order enjoined creditor William Gottlieb ("Gottlieb") from pursuing a claim directly against third party J. O. Stoll ("Stoll") based on Stoll's guaranty of Ten Fifteen's debt to Gottlieb. *Id.* at 168-69. Notwithstanding the bankruptcy court's order extinguishing the liability, Gottlieb subsequently pursued his guaranty claim against Stoll in a collateral proceeding. *Id.* at 169. Gottlieb argued in the subsequent proceeding that the bankruptcy court lacked authority to enter any order barring his pursuit of his guaranty claim against Stoll. *Id.* On review, this Court held that, regardless of whether the bankruptcy court had jurisdiction to enter its order in the first place, the bankruptcy court's original jurisdiction was not subject to challenge in a collateral proceeding, but was binding on Gottlieb. *Id.* at 172.

The Court began its analysis by reciting the familiar rule that "[a] court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators." *Id.* at 171. Nonetheless, the Court explained that "[t]here must be admitted . . . a power to interpret the language of the jurisdictional instrument and its application to an issue before the court." *Id.* The Court likewise explained that "[i]t is just as important that there should be a place to end as that there should be a place to begin litigation." *Id.* at 172. Further, "[t]here is no reason to expect that the second decision will be more satisfactory than the first." *Id.*; *see also* 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4428, at 23 (2d ed. 2002); 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.30[1][d][iii] (3d ed. 2009); *see generally Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) (describing the *Stoll* decision as one where "a judgment rendered in a case in which it was ultimately concluded that the District Court was without jurisdiction was nonetheless res judicata on collateral attack made by one of the parties") (citing *Stoll v. Gottlieb*, 305 U.S. 165 (1938)); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

The Court's decision in *Stoll* is directly analogous. Just as the creditor in *Stoll* could not

ignore the bankruptcy court's order enjoining him from pursuing his guaranty claim, Funds cannot ignore the bankruptcy court's confirmation of Espinosa's Plan and its discharge of Espinosa's unpaid indebtedness. *Stoll* is all the more relevant because the nature of the creditor's objection in *Stoll* is precisely the same as the Funds' objection here.

Stoll was decided under the former Bankruptcy Act of 1898. Section 16(a) of the Act provided expressly that "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." Act of July 1, 1898, ch. 541, § 16(a), 30 Stat. 550, 11 U.S.C. § 35 (repealed 1979).[7] In other words, section 16(a) rendered Gottlieb's guaranty claim against Stoll nondischargeable in Ten Fifteen's bankruptcy proceeding. Nonetheless, Ten Fifteen provided in its plan that Stoll's guaranty liability would be extinguished. Gottlieb had notice of the bankruptcy, yet failed to object to this provision prior to confirmation of the plan. Accordingly, the court confirmed the plan, which thus became binding on all parties and discharged the guaranty obligation.[8] As a result,

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[7] The Bankruptcy Code contains a similar provision. *See* 11 U.S.C. § 524(e).

[8] Ten Fifteen confirmed its plan under section 77B of the former Bankruptcy Act of 1898. *See Stoll*, 305 U.S. at

Gottlieb was bound by the plan and his claim was discharged notwithstanding the clear terms of section 16(a) providing that the debt was *not* dischargeable. Gottlieb could and should have voiced his objection based on section 16(a) prior to confirmation of the plan. Because he failed to do so, he was bound by the plan and his claim was released.

In this case, Funds makes the same argument. Funds asserts that section 528(a)(8) renders its claims nondischargeable absent a finding of undue hardship. Yet Funds failed to voice this objection prior to confirmation of Espinosa's Plan, which clearly provided that, upon completion of his plan payments, any unpaid portion of Funds' claim would be discharged. Because Funds failed to make its argument in a timely fashion, its argument has been waived. As a result, following Espinosa's discharge, Funds could not engage in any debt collection activity against

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168; Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 912, 11 U.S.C. § 207 (repealed 1938). Like section 1327(a), section 77B(g) provided that the provisions of a confirmed plan "shall be binding upon...the debtor...and...all creditors..." Act of June 7, 1934, ch. 424, § 77B(g), 48 Stat. 920, 11 U.S.C. § 207(g) (repealed 1938). Similarly, section 77B(h) provided that the final decree in the case operated to "discharge the debtor from its debts and liabilities...except as provided in the plan..." Act of June 7, 1934, ch. 424, § 77B(h), 48 Stat. 920, 11 U.S.C. § 207(h) (repealed 1938).

Espinosa attempting to recover any additional sums beyond the payments Espinosa made under his Plan.

B. Funds' Position Conflicts With The Essential Logic and Operation of the Bankruptcy Process.

Bankruptcy proceedings are fundamentally *in rem* in nature. Upon commencement of a bankruptcy case, the debtor's property resides in the custody of the bankruptcy court. *Straton v. New*, 283 U.S. 318, 320-21 (1931); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 189-90 (1902). Likewise, a bankruptcy court's *in rem* jurisdiction is premised on the debtor and his estate, not his creditors. *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). Jurisdiction of this kind allows a bankruptcy court to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" *Id.* at 448 (quoting 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 108.70[1], at 108-106 (3d ed. 2004)).

The discharge of a debt is also an *in rem* remedy, and creditors are generally bound by a discharge order. *Hood*, 541 U.S. at 447. Similar to admiralty law, the *in rem* aspects of bankruptcy law are essential to the functioning of the bankruptcy court and, for over two centuries, have been an intrinsic part of bankruptcy juris-

prudence. It is only because the bankruptcy process is binding on all creditors that the critical functions of bankruptcy law – granting the debtor a fresh start, protecting and preserving an insolvent debtor's assets, and the adjustment and payment of claims against those assets – may be performed. As this Court has noted, it is by virtue of the binding nature of its determinations that "[a] bankruptcy court is able to provide the debtor a fresh start . . . despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the debtor and his estate, and not on the creditors." *Id.* Accordingly, once a bankruptcy plan is confirmed, it is binding on all parties, and once the opportunity for direct appeal has passed, the confirmation order is a final judgment, immune from challenge on collateral review. *Travelers*, 129 S.Ct. at 2206; *Stoll*, 305 U.S. at 171-72; *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1997).

The Funds' position in this case stands at odds with these essential principles and places in jeopardy a variety of bankruptcy objectives by eroding the finality of the bankruptcy court's jurisdiction to implement them. Obviously, the benefits of a bankruptcy court's confirmation of a debtor's plan and entry of a discharge order would be eroded dramatically if the bankruptcy court's orders were subject to collateral attack, or could be simply ignored. *See* 5 COLLIER ON BANKRUPTCY ¶ 1141.01[1] (15th ed. 1995).

Funds seeks shelter in this Court's decision in *Hood*, but *Hood* does not support its position. To begin with, *Hood* involved a proceeding under chapter 7 of the Bankruptcy Code, in which plans are not used and payments under plans are not made. More important, finality was irrelevant in *Hood* because the debtor had failed in the first instance to list her student loans and have them included in her general discharge order. 541 U.S. at 444 ("Hood did not list her student loans in the bankruptcy proceeding, and the general discharge did not cover them."). Accordingly, her creditor was not given the opportunity to contest the discharge's coverage of her debt because no order had been issued purporting to discharge it.

In contrast, in this case Espinosa's Plan specifically dealt with his student loan obligations, and Funds had every opportunity prior to confirmation to object to its proposed treatment under the Plan. JA 26, 42-45. Following Espinosa's full completion of his payments under his Plan, the bankruptcy court issued its discharge order, which order did *not* except Espinosa's student loans from discharge (leaving aside the clerical error that was later rectified). JA 46, 48. Funds' failure to make a timely objection to the Plan, or otherwise challenge or appeal the orders confirming the plan and granting

Espinosa his discharge, are properly fatal to its arguments in this case.

CONCLUSION

For the foregoing reasons, as well as those offered by respondent, the decision of the court below should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

11 U.S.C. § 523 (1992) EXCEPTIONS TO DISCHARGE

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

***

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless—

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

11 U.S.C. § 1321 (1992) FILING OF PLAN

The debtor shall file a plan.

Statutory Appendix

11 U.S.C. § 1322 (1992) CONTENTS OF PLAN

(a) The plan shall—

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

***

(c) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

Statutory Appendix

11 U.S.C. § 1325 (1992) CONFIRMATION OF PLAN

***

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

***

Statutory Appendix

11 U.S.C. § 1327 (1992) EFFECT OF CONFIRMATION

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

***

11 U.S.C. § 1328 (1992) DISCHARGE

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5) of this title;

(2) of the kind specified in paragraph (5) or (8) of section 523(a) or 523(a)(9) of this title; or

(3) for restitution included in a sentence on the debtor's conviction of a crime.

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

(d) Notwithstanding any other provision of this section, a discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

(e) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if—

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

11 U.S.C. § 1330 (1992) REVOCATION OF AN ORDER OF CONFIRMATION

(a) On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

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(12)

No. 08-1134

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In The

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* EDUCATIONAL CREDIT MANAGEMENT CORPORATION IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF EDUCATIONAL CREDIT MANAGEMENT CORPORATION IN SUPPORT OF PETITIONER

Educational Credit Management Corporation submits this *amicus curiae* brief in support of Petitioner United Student Aid Funds, Inc.[1]

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Educational Credit Management Corporation (ECMC) is a private, nonprofit corporation and guaranty agency in the Federal Family Education Loan (FFEL) Program, one of two federally-insured student loan programs.[2] The federal

[1] Pursuant to Sup. Ct. R. 37.3(a), counsel of record states that all parties have consented to the filing of this brief by *amicus curiae*, and their consent letters are on file with the Clerk's Office. Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* has made a monetary contribution to the preparation or submission of this brief.

[2] The Federal Government operates two student loan programs: The Federal Family Education Loan (FFEL) Program and the William D. Ford Federal Direct Loan (DL) Program. Both programs are regulated by the United States Department of Education (ED) and are federally-insured.

financial interest at stake in the federal student loan program is paramount, totaling $525 billion.[3]

ECMC is also a specialized guarantor designated by the United States Department of Education (ED) to receive assignment of chapter 13 accounts when a borrower has filed bankruptcy. Twenty-six of the 35 FFEL Program guaranty agencies as well as ED assign their chapter 13 bankruptcies to ECMC for servicing during the bankruptcy. ECMC guarantees or services approximately 65% of the total FFEL Program loan volume currently in bankruptcy. In the Ninth Circuit alone, ECMC manages the accounts of 6,600 chapter 13 bankruptcy debtors who have FFEL student loans, totaling over $148 million and an additional 53,000 chapter 13 bankruptcy cases nationwide, representing almost $1.1 billion.

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[3] The most current dollar amount publicly available indicates that, as of September 2008, there is approximately $415 billion of student loans in the FFEL Program and $109.9 billion in the DL Program. *See* http://www.ed.gov/about/reports/annual/2008report/report.pdf, at 32, 144. The actual current total dollar amount is likely much higher. FY2009 loan volume has in fact, exceeded the FY2010 budget projections: "Overall federal education loan volume increased by $7.3 billion to a total of $28.0 billion in the first six months of FY2009 as compared with the first six months of FY2008, a 35% year-over-year increase. This compares with the 13.6% increase assumed by the president's FY2010 budget." *See* http://www.finaid.org/loans/fy2009v2008loanvolume.txt.

To survive, the FFEL Program relies on loan repayments to fund new student loans. Because collecting student loans assures the program will continue, Congress has repeatedly passed legislation to minimize the loss of federal funds due to student loan defaults, collection failures, and especially discharge in bankruptcy. In addition to increasingly stricter bankruptcy legislation, this Court has promulgated specific bankruptcy processes to effect congressional intent and to create uniform bankruptcy practices.

The federally-mandated regulatory claims process and the sheer volume of bankruptcy claims has the potential of effectively limiting a guaranty agency's meaningful participation in chapter 13 cases, at least in the plan confirmation process. For example, when a borrower files a chapter 13 bankruptcy, the lender receives general notice of filing from the bankruptcy clerk; the lender then files a claim for the student loan with the guaranty agency, who then, in the majority of cases, assigns the account to ECMC for handling. It is not uncommon for these transfers to exceed the time set by the rules to object to confirmation of the plan.

As the primary chapter 13 bankruptcy processer, servicing $1.25 billion, ECMC receives 18,537 bankruptcy documents monthly by U.S. mail. Of this monthly number, nearly 20% or 3,587 alone are chapter 13 plans. In many cases, by the time the bankruptcy claim is processed, the chapter 13 plan

may already have been confirmed before the guaranty agency has received actual notice or had a realistic opportunity to respond. Through legislation, Congress has addressed these pragmatic and administrative burdens facing student loan creditors by requiring debtors to provide heightened notice to the loan holders when seeking to discharge student loan debt.

Only the Ninth Circuit stands at odds with Congress, this Court, and five circuit courts that have affirmed the very specific rules and process debtors must follow to discharge their student loan debt. Because ECMC plays an integral role in the federal student loan program, it brings a practical perspective that may assist the Court in its decision.

SUMMARY OF ARGUMENT

The Ninth Circuit's *Espinosa*[4] decision is an aberration that defies Congress's pragmatic student loan discharge process. This decision, which validates the deliberately illegal practice of discharging student loans by declaration in a chapter 13 plan, invites debtors and their counsel to lay a trap for their student loan creditor. If the debtor slips a single sentence into his chapter 13 plan and if the student loan creditor does not carefully police every plan and catch this single sentence, then the debtor has craftily avoided his burden to file an adversary proceeding and prove undue hardship as expressly required by Congress and this Court. The debtor has dodged repaying his federally-insured debt with the stroke of a pen, and, by sneaking a single sentence into an administrative document, thousands of which are mailed to creditors every day, the debtor has avoided every obligation placed on him by statute. This is simply not the law as set forth by Congress in the Bankruptcy Code or the process prescribed by this Court.

In weighing a debtor's right to a fresh start against future students' right to student loans, Congress chose to protect the federal student loan program. It did so by making the debtor act, not the creditor. This dichotomy, which this Court has

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[4] *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193 (9th Cir. 2008).

affirmed, is set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure:

Debtors' Obligations:

- Debtors alone have the burden to prove entitlement to a discharge of their student loan debt.
- Debtors' burden is heavy because student loans are presumptively nondischargeable.
- Debtors can only satisfy this burden by filing an adversary proceeding, which is a federal court action separate from the main bankruptcy case, and proving undue hardship.
- Filing an adversary proceeding requires a summons and complaint and service of process, i.e., notice above mailing to a post office box.
- Absent debtors taking all of these required steps and satisfying the legal standard for undue hardship, the bankruptcy court's discharge order will not include a discharge of the student loan debt.

Student Loan Creditors' Rights:

- Creditors' status as holder of a nondischargeable debt is established by statute.
- Creditors do not need to take any steps to "obtain" nondischargeable status because nondischargeability status is "self-executing."
- Creditors can expect to receive notice through service of a summons and complaint of an adversary proceeding if the nondischargeability status of the debt is contested.
- Nothing in the Bankruptcy Code or Rules leads creditors to believe their nondischargeable debt can be eliminated by illegal language stuck in a plan.
- Creditors expect that, absent action by debtor, the student loan debt will not be included in the standard discharge order.

Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450-53 (2004). This practical, procedural process is what Congress intended, what this Court has affirmed is due, and what the student loan creditors have a right to expect.

Adopting *Espinosa*'s approach has significant financial and practical consequences for the federal government, the student loan industry, and the legal processes governing bankruptcy courts. It also

sanctions a dangerous path for debtors to discharge other nondischargeable debts like child support, spousal maintenance, tax debt, and personal injury and wrongful death judgments through their chapter 13 plans. *Espinosa* reduces the bankruptcy process to gamesmanship and condones and encourages unethical, sanctionable practices by debtors' attorneys. ECMC urges this Court to reverse the Ninth Circuit's *Espinosa* decision.

ARGUMENT

I. Orders Discharging Student Loan Debt Through the Plan Confirmation Process Violate Creditors' Right to Due Process and Are Void.

A. This Court has specifically delineated the process that is due.

The Constitution vests Congress with plenary power to legislate "uniform laws on the subject of Bankruptcies." U.S. CONST. art. I, § 8, cl. 4. In turn, pursuant to 28 U.S.C. § 2075, Congress imbued this Court with the mandate "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11." In promulgating the Federal Rules of Bankruptcy Procedure, this Court specifically delineated the process that is due to student loan creditors before student loan debt may be discharged. It is this specific process – established by this Court –

that the Ninth Circuit ignores, without legal or factual justification.

1. *Mullane* establishes the process that is due.

More than five decades ago, this Court held that due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*." *Mullane v. Cen. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Critically, the Ninth Circuit misses or improperly dismisses this key phrase: "appropriate to the nature of the case." To accord finality to a bankruptcy court's plan confirmation order, *Mullane* requires that the notice be

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> . . .
>
> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id. at 315.

Significantly, Congress expressly incorporated the *Mullane* standard in the Bankruptcy Code:

> In this title –
>
> (1) "after notice and a hearing," or a similar phrase –
>
> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances.

11 U.S.C. § 102(1). This provision, read together with 11 U.S.C. § 523(a)(8), leaves little doubt that the process due in student loan discharge matters is "heightened" to afford "greater procedural protections" to student loan creditors. *See Hood*, 541 U.S. at 451 (Rehnquist, C.J.) ("Because student loan debts are not automatically dischargeable . . . the Federal Rules of Bankruptcy Procedure provide creditors greater procedural protection.").

2. *Hood* prescribes precisely which bankruptcy rules must be followed to satisfy *Mullane*'s due process requirements in the student loan discharge context.

This Court stated that, "unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." *Hood*, 541 U.S. at 449 (Rehnquist, C.J.) (citing 11

U.S.C. § 523(a)(8)). As Chief Justice Rehnquist explained, § 523(a)(8) is "self-executing," requiring the debtor – not the creditor – to seek the dischargeability determination through an adversary proceeding as required by Fed. R. Bankr. P. 7001(6). *Id.* at 450.

Further, Chief Justice Rehnquist noted that, absent Rule 7001(6), debtors could affirmatively seek discharge of their student loan debt by motion under Rule 9014 without raising constitutional concerns. *Hood*, 541 U.S. at 453; *but see* Fed. R. Bankr. P. 9014(b) (requiring Rule 9014 motion "shall be served in the manner provided for service of a summons and complaint under Rule 7004"). Under 7001(6), debtors must initiate an adversary, file a complaint, and serve a summons on the student loan creditor pursuant to Fed. R. Bankr. P. 7004. *Hood*, 541 U.S. at 450-51.

In this case, the bankruptcy court clerk mailed the general notice of the bankruptcy filing to USA Funds. Given the unique "nature of the [bankruptcy] case" in student loan discharge matters, sending general notice to a post office box address, addressed to no particular person cannot be construed – at any level – as notice "appropriate to the nature of the case."

B. The Ninth Circuit's conclusion that notice under Fed. R. Bankr. P. 2002 satisfies a creditor's due process is contrary to this Court's decisions in *Mullane* and *Hood*.

Long ago, this Court recognized that "[e]ven creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953). *Hood* specifically outlined what rules debtors must follow to satisfy the "greater procedural protection" student loan creditors enjoy in bankruptcy settings. *Hood*, 541 U.S. at 550-52.

Curiously, Espinosa himself never served any type of notice, let alone service of process, on USA Funds, and there is no dispute that the only notice provided to USA Funds was mailed to a post office box pursuant to Fed. R. Bankr. P. 2002 by the bankruptcy court clerk. The Fourth Circuit explained the difference between Rule 2002 notice and Rule 7004 notice in bankruptcy:

> Fed. R. Bankr. P. 2002(b) does not require specific notice of plan provisions affecting a particular creditor, nor does it require the notice to be served in any particular manner or upon any particular person. "[T]here are many aspects to and actions that may be taken in bankruptcy cases which affect the general administration of the case and all

> creditors generally, but none specifically." Generally, such matters require "notice," but not service of process. When the rights of specific parties become an issue, however, service of the initiating motion or objection on the affected party is required. Fed. R. Bankr. P. 7003, 7004. Mailing the proposed plans, the hearing notice, and the confirmation order satisfies the "notice" requirement under Rule 2002, but not the service and summons requirements of Rule 7004.

Banks v. Sallie Mae Serv. Corp. (*In re Banks*), 299 F.3d 296, 301 (4th Cir. 2002) (internal citation omitted); *see also Ruehle v. Educ. Credit Mgmt. Corp.* (*In re Ruehle*), 412 F.3d 679, 684 (6th Cir. 2005); *Hanson v. Educ. Credit Mgmt. Corp.* (*In re Hanson*), 397 F.3d 482, 486-87 (7th Cir. 2005); *Repp v. Educ. Credit Mgmt. Corp.* (*In re Repp*), 307 B.R. 144, 152-56 (B.A.P. 9th Cir. 2004) (holding that "notice less than that which results from compliance with Rule 7004's requirement for serving a complaint on a corporate defendant flunks due process").

The Ninth Circuit's assertion that the plan itself or the Trustee's general warning letter, both which were mailed by the court's clerk to a general post office box, were sufficient notice falls wide off the *Mullane* mark. *See Espinosa*, 553 F.3d at 1200, n.4. That USA Funds received general notice or that "nobody-in-particular" at USA Funds may have received actual notice is also not the specific,

appropriate notice this Court, the Bankruptcy Code, or the Bankruptcy Rules require.

Here, the process -- or lack thereof – chosen by Espinosa was substantially less likely to "bring home notice" than the "feasible," "customary," and legally required alternative: summons and complaint, delivered to a registered agent or corporate officer. *See Repp*, 307 B.R. at 149 ("The nub of the problem . . . is that the method chosen for notice was calculated to minimize the chance that it would come to the attention of persons in the position to make litigation decisions for the creditor.").

If Espinosa had actually desired to notify USA Funds of his intent to discharge his student loan, he could easily have served the corporate officer or registered agent of the student loan creditors with a summons and complaint as required by the Bankruptcy Rules. Instead, he served no notice at all of his intent to discharge his student loan debt by less than payment in full but rather relied on the court clerk to mail general notice under Rule 2002. This practice places the student loan creditor in an unfair position:

> It is black-letter law that [student loan creditors] are not required to respond per Rule 7012 until they have been "duly served" in accordance with Rule 7004 and need not fear a default judgment if they have not been "duly served." Yet -- Catch-22 – if they do not respond to notice of a plan mailed in accordance with Rule 2002 to nobody-in-particular at a

> payment lockbox, they stand to lose their rights by default to an "illegal" plan provision that they – double Catch-22 – are entitled to expect the court, in the exercise of its independent duty, to reject in the first place.

Repp, 307 B.R. at 153.

The form of notice served on USA Funds was not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. In this case, Espinosa never issued a summons or complaint and the issue of undue hardship was never litigated.[5]

While not every procedural rule violation offends due process, *Hood*'s explicit recitation of procedural requirements in student loan discharge matters is not mere dicta as Espinosa argued below. Rather, *Hood*'s discussion about the procedural rules at issue here is fundamental to all of the Bankruptcy Code, whether the issue is sovereign immunity or student loan

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[5] Indeed, Espinosa did not attempt to plead or prove in his plan that payment of the full amount of his student loan debt would constitute an undue hardship.

discharge.[6] 11 U.S.C. § 102 embodies the *Mullane* standard for notice. *Hood* reaffirms the specific notice appropriate in student loan discharge matters as required by § 102 and the Bankruptcy Rules. Under *Hood*, the appropriate notice is a heightened notice, to afford a greater procedural protection to effect Congress's explicit intent to prevent discharge of student loan debt, except upon proof of undue hardship under § 523(a)(8). *Hood*, 541 U.S. at 451.

The bankruptcy rules do not invoke or create a constitutional due process notice standard, but they do require a certain specific process, just like service of process rules in the Federal Rules of Civil Procedure. And it is reasonable for any bankruptcy

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[6] The Ninth Circuit wrongly suggests that, in the student loan context, *Hood* narrowly stands for the proposition that "an adversary proceeding initiated by complaint and summons is not a statutory or constitutional prerequisite to an adjudication of student loan discharge." *Espinosa*, 553 F.3d at 1202 (citing Keith M. Lundin, *Chapter 13 Bankruptcy* § 229.1 (3d ed. 2000 & Supp. 2004)). Actually, *Hood*'s point is broader and simpler and does not "undermine[ ] Fund's argument." In *Hood*, Tennessee Student Assistance Corporation (TSAC), a state-based guaranty agency, invoked sovereign immunity from the student loan discharge action. This Court disagreed that the discharge action was an affront to TSAC's sovereignty on the ground that the discharge action was an *in rem* action and the court's jurisdiction was premised on the *res* not the person or the State. Thus, the form of pleading by which the sovereign was brought into the proceeding, i.e., a Summons and Complaint, did not change the fact that the bankruptcy proceeding was an *in rem* proceeding, and, therefore, the "undue hardship determination . . . is not a suit against a State for purposes of the Eleventh Amendment." *Hood*, 541 U.S. at 451 & n.5.

litigant to rely on and expect that *all* of the rules will be followed. Even the Ninth Circuit agrees that Congress intended for there to be a heightened notice standard to discharge student loan debt *but only when* a debtor files an adversary proceeding. Circularly, the Ninth Circuit reasons that, because Espinosa never filed an adversary proceeding, the creditor was not entitled to heightened notice. *Espinosa*, 553 F.3d at 1204. The Ninth Circuit did not and cannot relieve a debtor from following specific bankruptcy procedural rules that plainly require a debtor to file an adversary proceeding to discharge student loan debt.

Reversing *Espinosa* does not require drawing a constitutional due process bright line for student loan cases. Reversing *Espinosa* ensures that the simple notice standard and well-functioning procedural processes in the Bankruptcy Code and Rules are enforced. Reversing *Espinosa* ends the gamesmanship and forces debtors to follow the same rules as all litigants must do.

II. Confirmation Orders Containing Discharge-by-Declaration Provisions Have No Preclusive Effect.

In its wholesale rejection of this Court's precedent and the creditor's due process concerns, the Ninth Circuit relied primarily on its earlier plan language decision, *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999).

Although *Andersen*,[7] the early case that *Pardee* relied on had been reversed by the Tenth Circuit, the Ninth Circuit determined that *Pardee* and the overruled *Andersen* were still the right approach. The Ninth Circuit concluded it had not "strayed off course" and reaffirmed its *Pardee* decision, holding that

> *Pardee* and *Andersen* stand soundly for the better-reasoned principle that notice of how the Chapter 13 plan affects creditors' rights is all that the Constitution, the Bankrutpcy Code and the Bankruptcy Rules require to bind creditors to the provisions of a confirmed plan under § 1327(a).

Espinosa, 553 F.3d at 1202.

A. When two statutory provisions conflict, the specific statutory provision will prevail over the general statutory provision.

In concluding discharge-by-declaration provisions are not entitled to preclusive effect, the Tenth Circuit relied, in part, on the inherent statutory conflict between 11 U.S.C. § 1327(a) and 11 U.S.C. § 1328(a)(2). *Educ. Credit Mgmt. Corp. v. Mersmann* (*In re Mersmann*), 505 F.3d 1033 (10th Cir. 2007) (en

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[7] *See Andersen v. UNIPAC-NEBHELP* (*In re Andersen*), 179 F.3d 1253 (10th Cir. 1999), *overruled by Educ. Credit Mgmt. Corp. v. Mersmann* (*In re Mersmann*), 505 F.3d 1033 (10th Cir. 2007) (en banc).

banc). In overruling its earlier *Andersen* case, the Tenth Circuit noted "[g]iving preclusive effect to the [general] discharge-by-declaration through § 1327(a) renders [the specific exception] of § 1328(a)(2) nugatory." *Mersmann*, 505 F.3d at 1048.

Under statutory construction principles, when general and specific statutory provisions contradict, the "specific pronouncement [of § 1328(a)(2)] must be read as limiting § 1327(a) broad *res judicata* effect." *Id.* In other words, the specific language of the § 1328 discharge order that specifically excepts student loan debt from bankruptcy discharge limits the broader reach of the plan confirmation order that binds creditors who fail to object to illegal plan language. *Id.*; *see also Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 155-56 (2d Cir. 2005) (expressly rejecting the Ninth Circuit's reliance on the general preclusive effect of 11 U.S.C. § 1327(a)).

In a footnote, the Ninth Circuit dismissed the import of the Tenth Circuit's statutory ground because "it proves something that is both obvious and beside the point." *Espinosa*, 553 F.3d at 1199, n.3. While *Mersmann*'s holding is obvious, it is also "the point" the Ninth Circuit missed. Section 1327 and its general binding effect cannot control or dictate the specific exception for student loan debt contained in the general discharge provision of § 1328.

Moreover, the Tenth Circuit also noted that discharge-by-declaration language violates 11 U.S.C. § 1325's requirement that chapter 13 plans comply

with the Bankruptcy Code. Therefore, allowing a plan with illegal language to be confirmed "violates the general maxim that the Bankruptcy Code and Rules 'be construed so that their provisions are harmonious with each other.'" *Id.* Thus, giving "preclusive effect to a confirmation order based solely on § 1327(a) deprives the Bankruptcy Code and Rules of a coherent reading, fails to give full effect to all of their provisions, and undermines the clear will of Congress." *Id.* Section 1327 is not controlling in this instance; it simply has no preclusive effect on the student loan creditor who fails to object to an illegal plan confirmation order.

B. *Travelers v. Indemnity Co.* is immaterial to this case.

1. *Travelers* is inapposite.

While this Court's recent *Travelers*' decision discusses the finality of orders in bankruptcy cases, it is inapposite to the issue before this Court. *See Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009). *Travelers* does not support Espinosa's position for two reasons: First, *Travelers* did not address the tension between the finality of orders and orders entered in violation of a party's due process rights. In fact, this Court left Respondent Chubb's due process challenge to the bankruptcy court's 1986 Orders to the Second Circuit on remand because the Second Circuit had not previously considered it. *Travelers*, 129 S. Ct. at 2207; *see also Espinosa*, 553 F.3d at

1203-04 (noting that *Pardee* did not address due process and now rejecting three other circuit courts' due process holdings, finding the analysis "novel" and "unpersuasive"). Irrespective of *Travelers*' finality rule, *Espinosa* can and should be reversed independently on due process grounds. And, unlike *Travelers*, that issue is squarely before this Court and is ripe for decision.

2. At best, *Travelers* merely offsets the conflicting final orders.

Second, *Travelers* as much supports the finality of the plan confirmation order against USA Funds as it does the finality of the discharge order against Espinosa. Espinosa received his general discharge in 1997. The discharge order provided:

> Pursuant to 11 USC §1328(a), the debtor(s) are discharged from all debts provided for by the plan or disallowed under 11 USC § 502, ***except any debt***
>
> . . . .
>
> (c) for a student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8).

Jt. App. at 46. This order clearly excepted from discharge "any amounts remaining" on Espinosa's student loan debt. It is undisputed that Espinosa never challenged this discharge order or appealed the fact that the discharge order did not discharge "any amounts remaining" on his student loan debt as

proclaimed in his chapter 13 plan. Under this Court's *Travelers* decision, the bankruptcy court's 1997 discharge order was *res judicata* against Espinosa. *See Travelers*, 129 S. Ct. at 2205. Even the Ninth Circuit found that

> [c]uriously, the discharge order provided that Espinosa was "discharged from all debts provided for by the plan . . . except any debt . . . for a student loan," which contradicted the terms of the plan and pretty much rendered the whole exercise pointless from Espinosa's point of view. Curiouser[8] still, Espinosa did not seek reconsideration of the discharge order, nor did he appeal.

Espinosa v. United Student Aid Funds, Inc., 530 F.3d 895, 896 (9th Cir. 2008). Most important, however, the Ninth Circuit recognized that, rather than asking the bankruptcy court to modify the discharge order or moving for relief under Rule 60, Espinosa

> allowed the bankruptcy court's discharge to become final, and the time to appeal lapsed long ago. . . . Instead, Espinosa sought to enforce the discharge injunction against [USA Funds]. The obvious problem, of course, is that the discharge injunction simply does not run against [USA Funds] because the bankruptcy court's discharge

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[8] The Ninth Circuit's reference to *Alice in Wonderland* no doubt foreshadowed what was to come for the student loan industry.

> order did not cover its debt. [USA Funds] was thus free to collect its debt, and the bankruptcy court seems to have misread its own order when it held otherwise.

Id. at 898-99. Under *Travelers*, even if the discharge order failed to give Espinosa the "benefit of his bargain" as illegally provided for in his chapter 13 plan, the discharge became "final on direct review (whether or not proper exercises of the bankruptcy court jurisdiction and power), [and] it became *res judicata*" against Espinosa. *See Travelers*, 129 S. Ct. at 2205.

Despite conceding the finality of the discharge order, the consequences of Espinosa's failure to appeal, and the bankruptcy court's legally erroneous decision against USA Funds, the Ninth Circuit remanded the case to the bankruptcy court with "our express leave to consider whether its discharge order . . . was entered as a result of a clerical error [under Rule 60(a)]." *Id.* at 899.[9]

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[9] In remanding to the bankruptcy court, the Ninth Circuit noted that the Tenth Circuit approved the bankruptcy court's use of Rule 60(a) in *Mersmann* to amend an identically-styled discharge order. *Espinosa*, 530 F.3d at 899 (citing *Educ. Credit Mgmt. Corp. v. Mersmann* (*In re Mersmann*), 505 F.3d 1033, 1039-40 & n.5 (10th Cir. 2007)). The noted comment in *Mersmann* is dicta, at best, and is superfluous to the Ninth Circuit's use of Rule 60(a) here. The conflicting discharge order was not at issue in *Mersmann*. Moreover, *Mersmann* overruled its earlier *Andersen* decision, thereby forbidding the dischargeby-declaration practice in the Tenth Circuit. Had the

(Continued on following page)

3. The corrected 2008 discharge order was void because the court altered the parties' substantive rights.

Rule 60(a) allows a bankruptcy court to correct a clerical mistake, oversight, or omission in a judgment, order, or other part of the record, whenever one is found. Correction of "[e]rrors that affect substantial rights of the parties, however, are beyond the scope of rule 60(a)." *Mullins v. Nickel Plate Mining Co., Inc.*, 691 F.2d 971, 973 (11th Cir. 1982). Here, the bankruptcy court exceeded its authority under Rule 60(a) because the corrected discharge order completely changed USA Funds' substantive rights, rights that had vested a decade before in reliance on the order. *See id.*

Courts "plainly ha[ve] jurisdiction to interpret and enforce [their] own prior orders." *Travelers*, 129 S. Ct. at 2205. But the bankruptcy court's alteration of its 1997 discharge order went well beyond "interpretation" and was per se improper under Rule 60(a). Rule 60(a) "is concerned primarily with mistakes that do not really attack the party's fundamental right to the judgment at the time it was entered. It permits the correction of irregularities which becloud but do not impugn it." *United States v.*

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discharge order ***not*** been altered in *Espinosa*, Espinosa's contempt motion and the appeal to the Ninth Circuit would have been "pointless." *Espinosa*, 530 F.3d at 896. And had the discharge order ***not*** been altered, presumably the Ninth Circuit would not have ultimately ruled as it did.

Stuart, 392 F.2d 60, 62 (3d Cir. 1968). In this instance, USA Funds had the fundamental right to rely on the discharge order that was entered by the bankruptcy court in 1997 – an order that was entered in full compliance with the law and was never challenged by Espinosa.

Even the Ninth Circuit acknowledged that it is "an open question" as to whether, in 1997, the bankruptcy court could have entered an order giving effect to Espinosa's illegal plan. *Espinosa*, 553 F.3d at 898. Nonetheless, the Ninth Circuit remanded with express leave to do just that.

On remand, the bankruptcy court corrected the discharge order to include discharge of the student loans, noting that "it was the clear intent of the court, as reflected in the chapter 13 Plan, as approved by the court that all student loan-related obligations were to be discharged if the debtor successfully completed and performed the Plan."[10] Espinosa never challenged or appealed the order, and the bankruptcy court failed to correct it in 2003 even when that order was the basis of Espinosa's contempt motion. The bankruptcy court's alteration five years later and,

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[10] The judge who "corrected" the order to reflect the bankruptcy court's "clear intent" was not the judge who purportedly reviewed Espinosa's chapter 13 plan in 1992, signed the plan confirmation order in 1993, and signed the discharge order in 1997. The original judge passed away in 2001, seven years before the clerical error issue was even raised.

then only with nudging from the Ninth Circuit, is untenable under Rule 60(a).

Finally, while the bankruptcy court below may have "corrected" the discharge order to give effect to the factual language in the plan, it would be absurd to allow a bankruptcy court to make a lawful, final order unlawful under Rule 60(a). *Cf. Warner, III v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976). Such license "would significantly weaken the policy of finality as embodied in the Federal Rules." *Id.* (citing Moore, Federal Practice, Vol. 6(a), at 4043 (1973)).[11]

The bankruptcy court's alteration of a lawful, final discharge order "'concern[s] the outer reaches of a bankruptcy court's jurisdiction.'" *Travelers*, 129 S. Ct. at 2203 (citing *In re Johns-Manville Corp.*, 517 F.3d 52, 55 (2d Cir. 2008)). Undoubtedly, a bankruptcy court has jurisdiction to enter discharge orders and to interpret and enforce its prior orders. *Travelers*, 129 S. Ct. at 2205. But a bankruptcy court exceeds its jurisdiction by entering a discharge order in violation of the Bankruptcy Code, and that order

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[11] Such a challenge to the court's 1997 discharge order by Espinosa would have been appropriate under Rule 59 or Rule 60(b). But Espinosa's time to challenge the 1997 discharge order under these rules lapsed more than a decade ago. *Cf. Warner, III*, 526 F.2d at 1213, n.4.

is therefore void. *Windsor v. McVeigh*, 93 U.S. 274, 282-83 (1876). In *Windsor*, this Court stated that

> [t]hough the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by law. [Judgments so entered] would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.

Id.; *see also Gagnon v. United States*, 193 U.S. 451, 457 (1904) (holding courts have authority to amend "any defect in the process or pleadings, upon such conditions as it shall, in its discretion and *by its rules*, prescribe" (emphasis addded)).

For the same reasons the plan confirmation order was void, *supra*, the bankruptcy court here lacked authority, by statute and "by its rules," to enter a discharge order that discharged student loan debt without a showing of undue hardship. *See generally Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958). By rewriting its lawfully entered discharge order more than a decade later to give effect "to the clear intent of the court as reflected in the chapter 13 plan," the court used Rule 60(a) as a guise to alter its previous order to reflect the subsequently condoned illegal discharge practice

sanctioned in *Pardee*. This renders the 2008 altered discharge order void. *Cf. id.*

Nothing in the Bankruptcy Code or Rules compels a bankruptcy court to enter an unlawful discharge order simply because it confirmed an unlawful plan, notwithstanding 11 U.S.C. § 1327. An illegal order at one stage of the bankruptcy process cannot dictate an illegal order at the end of the process. The discharge order cannot be the "getaway car" for the illegal plan confirmation order, especially in the same litigation. And even if the bankruptcy court intended to give effect to the illegal plan and confirmation order, the court lacked authority under Rule 60(a) and under the Bankruptcy Code to correct a lawful discharge order 11 years later. The 2008 altered discharge order is void. The 1997 discharge order became final and was *res judicata* against Espinosa.

Travelers does not save either party in this case.[12] At best, it offsets the finality of the two conflicting

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[12] In the duel of conflicting final orders, however, the discharge order would win as the order having the final say. While a plan confirmation order is a final order for the purposes of appeal, the actual discharge of debt is consummated only by the discharge order. In other words, without the discharge order, the plan confirmation order has no legal effect. *See Educ. Credit Mgmt. Corp. v. Coleman* (*In re Coleman*), 560 F.3d 1000, 1005 (9th Cir. 2009); *In re Jones*, 352 B.R. 813, 819-20 & n.13. (Bankr. S.D. Tex. 2006) (discharge order, not plan confirmation order, is the final order in a chapter 13 because plan confirmation order can be modified at any time under 11 U.S.C. § 1329).

orders. More importantly, it does not provide the answer to fixing the practical problem at hand here, that is, debtors should not be allowed to avoid their statutorily-imposed burden by slipping a sentence into an administrative document and avoiding basic procedural rules that every other litigant must follow. *Espinosa* is an aberration. It validates a practice that violates Congressional intent and this Court's precedent.

C. A plan confirmation order is not *res judicata* to issues that were not actually litigated.

Two circuits also rely on a *res judicata* analysis to conclude that a plan confirmation order has no preclusive effect on an issue that could not or should not have been litigated at the plan confirmation hearing. As a general matter, *res judicata* will be invoked only if there is (1) an adjudication on the merits, (2) the parties are identical or in privity, and (3) the claims were or could have been raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1989); *see also Mersmann*, 505 F.3d at 1049; *Whelton*, 432 F.3d at 154-55.

Discharge-by-declaration provisions fail *res judicata* elements for at least two reasons: First, failure to provide specific notice under Fed. R. Bankr. P. 7004 effectively denies the student loan creditor a full and fair opportunity to litigate the claim. *Mersmann*, 505 F.3d at 1049. Second, plan

confirmation is a narrow forum, limited to confirming those plans specified in 11 U.S.C. § 1325(a)(1) ("court shall confirm a plan if the plan complies with the provisions of this chapter"). Thus, courts cannot confirm a plan that violates § 1325.

Student loan debt is specifically excepted from the discharge under 11 U.S.C. § 1328(a)(2) unless the debtor makes "a specific factual showing" of undue hardship. *Whelton*, 432 F.3d at 155. Slipping illegal language into a chapter 13 plan violates these provisions because undue hardship cannot and is not proved through the chapter 13 plan itself. Moreover, in the plan confirmation process, the court never actually adjudicates the issue of undue hardship on the merits. *Mersmann*, 505 F.3d at 1050; *Whelton*, 432 F.3d at 155. Under the Bankruptcy Code, the dischargeability of student loan debt cannot be litigated at the plan confirmation stage; plan provisions purporting to discharge by declaration are "mere trespassers" and cannot and do not enjoy the statutory *res judicata* effect of § 1327. *Educ. Credit Mgmt. Corp. v. Whelton (In re Whelton)*, 299 B.R. 306, 315 (Bankr. Vt. 2003) ("The Confirmation Order enforces only those provisions of the Plan that are required or permitted to be there by the Bankruptcy Code and cannot be usurped to validate or enforce provisions that were never properly lodged in the Plan.").

The Ninth Circuit considered but rejected this *res judicata* analysis, stating that the *Mersmann* and *Whelton* decisions do not offer any persuasive reasons

why the discharge-by-declaration provisions should not be given full preclusive effect. *Espinosa*, 553 F.3d at 1200. Foremost, the Ninth Circuit rejected the application of *res judicata* principles because a "discharge injunction does not operate by way of *res judicata*," but is "an equitable remedy." *Id.*

The Ninth Circuit's fractured analysis and its conclusion violate this Court's precedent. That is, even if *res judicata* principles do not apply because a discharge injunction is an equitable remedy, that equitable remedy is still confined to the Bankruptcy Code. As this Court stated in *Norwest Bank Worthington v. Ahlers*, "[w]hatever equitable powers remain in the Bankruptcy Courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206-07 (1988). Thus, a discharge injunction cannot be exercised in contravention of another section of the Code. *Id.*

Espinosa erred by continuing to follow the rationale of *Pardee*, a case that has become an outlier. *Pardee*'s analysis is wrong: it cannot stand on *res judicata* grounds because the issue of undue hardship – or even the broader issue of the dischargeability of student loan debt of any sort – cannot, should not, and was not litigated at the plan confirmation hearing. *Espinosa*'s analysis is irreconcilable with the Bankruptcy Code and this Court's precedent and must be reversed.

III. The Ninth Circuit's Decision Paves the Path for Debtors to Discharge Child Support, Spousal Maintenance, Tax Debt, and Wrongful Death Judgments Through Chapter 13 Bankruptcies.

Espinosa's aberrant holding is dangerous because it could easily extend beyond the context of student loan undue hardship cases into other presumptively nondischargeable debts. Its harm is immeasurable. Under the Ninth Circuit's rationale, debts such as child support, spousal maintenance, tax debt, court-ordered restitution, criminal fines and penalties, and others would all be susceptible to discharge via plan language. *See generally* 11 U.S.C. §§ 523(a), 1328(a).

This result directly contravenes the important public policy choices Congress made in declaring these debts presumptively nondischargeable. *See Cohen v. De La Cruz*, 523 U.S. 213, 222 (1998) ("The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress 'that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start.") (citing *Grogan v. Garner*, 498 U.S. 279, 287 (1991)). The Ninth Circuit's approach allows all debtors to circumvent rules promulgated by this Court pertaining to notice and service in initiating dischargeability proceedings for other types of nondischargeable debt. It also undermines the stability these rules are meant to provide, Congress's intent that these debts be nondischargeable in

bankruptcy proceedings, and the uniform application of bankruptcy laws.

IV. The Ninth Circuit's Decision Makes a Mockery of Bankruptcy Process and Encourages Unethical Conduct.

Even as limited to the student loan context, the Ninth Circuit's decision will have an enormous impact on the uniform application of the Bankruptcy Code, the student loan industry, the federal financial interest, and the efficiency of bankruptcy courts' process. If this Court were to adopt the Ninth Circuit's approach giving preclusive effect to discharge-by-declaration plan language, every student loan debtor will attempt it. Indeed, it would cost nothing for the debtor to slip a sentence in a chapter 13 plan purporting to discharge student loans. Debtors and their counsel would not even be subject to sanctions if they modified their plans within 21 days of the sanction motion, even though, as the Ninth Circuit acknowledges, the provision is unquestionably illegal. Fed. R. Bankr. P. 9011; *see also Espinosa*, 553 F.3d at 1202. Bankruptcy attorneys would face an ethical conundrum between zealous advocacy on behalf of their clients and ensuring that their clients meet the elements of an undue hardship in good faith. *See Mersmann*, 505 F.3d at 1050 ("Bankruptcy attorneys may be caught on the horns of a dilemma between aggressively pursuing a discharge-by-declaration on behalf of clients and ensuring that their clients meet the elements of an 'undue hardship' in good faith.").

In contrast, student loan creditors would be required to hire local counsel to file objections to every chapter 13 plan in which a student loan is involved. The attorney fees and costs incurred by creditors would be extraordinary. The system would be clogged with plan objections, withdrawals of motions to modify, and sanctions requests. Yet the bankruptcy system would enjoy no benefit or gain from this meaningless practice.

This futile process will only inundate the bankruptcy courts with pointless objections that would always be successful because there is no question that student loan creditors are entitled by statute and rule to an adversary proceeding to determine undue hardship, as the Ninth Circuit has acknowledged. *See Espinosa*, 553 F.3d at 1202 (stating that if the creditor were to object, the bankruptcy court would be required to force the debtor to initiate an adversary proceeding and amend his plan).

Adopting the Ninth Circuit's approach will cause bankruptcy courts and creditors to be overly burdened in a futile exercise of entertaining and granting countless objections to confirmation. Some loans will be discharged by use of plan language. Some loans will not. Some attempts will be caught by the trustee. Some will be caught by the court. Some will be held to their statutory burden of proof of establishing undue hardship. Some will not have to prove anything. The better outcome would be to prohibit this practice rather than rewarding it.

CONCLUSION

Only this Court can stop the illegal discharge of student loan debt through the chapter 13 plan confirmation process. Unless *Espinosa* is reversed, the certain consequences will be the rise of gamesmanship, mockery of bankruptcy process, and serious damage to the federal financial interest. Countenancing the practice of discharge-by-declaration, at any level, erodes the fundamental processes that embody this Court's jurisprudence. This Court should reverse the Ninth Circuit to restore certainty and consistency formulated by the Bankruptcy Code and Rules.

Respectfully submitted,

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Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,
PETITIONER,
v.
FRANCISCO J. ESPINOSA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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STATEMENT OF AMICUS INTEREST[1]

The International Municipal Lawyers Association ("IMLA"), previously known as the National Institute for Municipal Law Officers, is a non-profit, professional organization of over 3000 local government entities, including cities, towns counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and state supreme and appellate courts. IMLA members, and the cities and towns that they represent, have a substantial interest in the treatment of local tax claims with respect to taxpayers who file petitions for relief in U.S. Bankruptcy Courts.[2]

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[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, neither party nor their counsel authored this brief in whole or in part. Neither party nor their counsel made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission.

[2] Congress recognized the importance of certain municipal taxes by providing that the creation or perfection of a statutory lien on a debtor's property for *ad valorem* property taxes does not violate the automatic stay provision of the Code (if the tax or

Prior to *In re Espinosa*, 533 F.3d 1193 (9th Cir. 2008), protections for nondischargeable municipal tax claims were self-executing under the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the "Code"). Municipalities were permitted to rely on the self-executing nature of nondischargeability, absent an adversary proceeding judgment or contested proceedings to the contrary. Should, however, the Ninth Circuit's decision in *Espinosa* be affirmed, the result may well be that the claims of cities and towns in Chapter 13 proceedings will be extinguished by the mere declaration in a Debtor's plan, if no timely objection is filed. As such, this Court's resolution of the "discharge-by-declaration" implications of the Ninth Circuit decision directly impacts the municipality's recovery of nondischargeable tax obligations.

IMLA's member cities and towns rely on tax revenues raised from municipal assessments on real and personal property to fund important municipal services.[3] Congress recognized the importance of

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assessment comes due after the date of the filing of a petition for relief). 11 U.S.C. § 362(18). Municipal taxes (real property and excise) are accorded payment priority under the Code if they are administrative expenses or if they are allowed claims possessing priority within 11 U.S.C. § 507(a)(2) and (8). As IMLA recognizes that not every municipal obligation is treated as nondischargeable in a bankruptcy proceeding, this amicus brief is based only on those debts that would otherwise be deemed as nondischargeable under the Code.

[3] The Lincoln Institute of Land Policy has calculated the nationwide percentage of general revenue from local property taxes, based on 2005 census data, at 27.95%. The range is between 8.94% (for Arkansas) to 55.95% for Connecticut, with thirteen states having an average property tax revenue higher

these tax revenues to the fiscal well being of municipalities by granting special priorities, most importantly, the nondischargeable nature of certain municipal taxes.

Municipal taxes are excepted from the discharge provisions of the Code if they fall within 11 U.S.C. § 523(a)(1). In contrast to student loan obligations, municipal tax obligations are not *presumptively* nondischargeable. Rather, municipal tax obligations *are always* nondischargeable if they fall within 11 U.S.C. § 523(a)(1). Many small municipalities[4] do not retain bankruptcy counsel for Chapter 13 proceedings, perhaps believing until *Espinosa* that since Congress established certain tax obligations as nondischargeable that orders confirming plans which contained impermissible provisions affecting nondischargeable tax obligations would be deemed void. Many municipalities simply cannot afford to allocate more resources towards tax recovery activities where the taxpayers have filed bankruptcy. The average American municipality with a population under 10,000 generates almost

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than 33%. *See* "Summary — Local Property Tax Revenue, by State — 2005," available at *http://www.lincolninst.edu/subcenters/significant-features-propertytax/census/ViewTable.aspx?table=3.*

[4] Of the 38,967 general purpose local governments (municipalities, towns, townships and counties) in the United States, a little over 19,000 are classified as municipalities, and of those approximately 15,000 have less than 5,000 residents. The same is true for towns and townships; of the 16,504 towns and townships, over 14,000 have fewer than 5,000 people. *See* 2002 Census of Governments, Vol. 1, No. 1, "Government Organization," U.S. Census Bureau, Tables 3 and 7, available at *http://www.census.gov/prod/2003pubs/gc021x1.pdf.*

exactly as much revenue as it expends, and expends just $7.59 per capita on judicial and legal expenses. *See* 2002 Census of Governments, Vol. 4, No. 4, "Government Finances," U.S. Census Bureau, Table 13, available at *http://www.census.gov/prod/2005pubs/gc024x4.pdf.* Requiring a municipality to expend more on legal costs to maintain revenue levels would result in less resources being allocated to other municipal services, such as education ($31.94 per capita for municipalities under 10,000) and fire and police protection (a combined $185.11 per capita for municipalities under 10,000). The net effect would be to employ counsel *ab initio* to keep vigilant for plans which contain impermissible provisions.

The ramifications of the Ninth Circuit's decision have the potential to affect adversely municipalities in two immediate outcome related ways. First, the *Espinosa* decision permits a debtor to treat nondischargeable debts in a way which does not permit the full recovery of an allowed claim, in a Chapter 13 plan. The practical effect of allowing "discharge-by-declaration" may result in a reduction of available municipal income.

Second, the *Espinosa* decision will require municipalities, in light of the potential loss of income, to devote substantial resources to reviewing Chapter 13 plans, and object to plans which will *de facto* contain provisions in conflict with the Code. This will require municipalities to participate in Chapter 13 proceedings to preserve the *status quo*

ante or run the risk that some or all of their otherwise nondischargeable taxes will be discharged.

Congress did not intend for tax obligations to be subordinate to the debtor's need for a fresh start. *Bruning v. United States*, 376 U.S. 358, 361 (1964) (stating the "congressional judgment that certain problems—e.g., those of financing government—override the value of giving the debtor a fresh start."). In the wake of the Ninth Circuit's decision, municipalities face a no win situation – either allocate scarce resources objecting to facially deficient Chapter 13 plans which treat nondischargeable claims as dischargeable, or risk the loss of valuable tax revenue. In either event, one effect of affirming *Espinosa* may be that municipalities may well cumulatively have less resources to address the needs of their citizens. A second effect may be that debtors' counsel will be duty-bound to seek the most aggressive claims treatment, regardless of Congressional mandates to the contrary, to try and "sneak one past" creditors relying on nondischarge Code provisions and on the Federal Rules of Bankruptcy Procedure (the "Rules") which may require an adversary proceeding.

SUMMARY OF THE ARGUMENT

In *Espinosa*, the Ninth Circuit allowed the debtor to discharge his student loan debts without initiating an adversary proceeding to determine affirmatively that his student loans were an undue hardship as required by 11 U.S.C. § 523(a)(8) and Fed. R. Bankr. P. 7001(6). Stated plainly, it would

appear that the Ninth Circuit rewarded a debtor who filed a plan in contravention of the express requirements of the Code and the Rules. This practice, now known as "discharge-by-declaration," affects all creditors possessing nondischargeable debts, including municipalities. *Espinosa* held that all creditors are bound by a confirmed Chapter 13 plan regardless of whether the requisite notice given to the adversely affected creditor complied with the Code or the Rules. The consequence of affirming the Ninth Circuit is therefore that creditors with presumptively nondischargeable debts, including municipal creditors with nondischargeable tax debts, must devote already scant resources to Bankruptcy proceedings, which on a case by case Chapter 13 recovery basis will not justify the allocation.

The Ninth Circuit rejected any alleged violations of due process on the grounds that the creditor received notice, even if that notice did not comply with the Rules. The Ninth Circuit speculated that because the bankruptcy creditor was a "sophisticated" business entity, the failure to object may well be a calculated strategy. *Espinosa*, 553 F.3d at 1205. Such seems a leap and the applicability of this dicta seems quite limited. This proposition surely does not analogously apply to small towns and unincorporated governmental units which may have limited resources to advocate effectively in Bankruptcy Courts.

IMLA, representing the interests of municipalities and their counsel, asks that this Court hold, in circumstances in which Congress recognizes

a debt is "presumptively nondischargeable" or simply "nondischargeable," that the debtor cannot proceed through "discharge-by-declaration." Instead, a debtor is required to commence an adversary proceeding as provided by Fed. R. Bankr. P. 7001(6). "You snooze, you lose" should not be the watch word of Chapter 13 practice. A better axiom might be that "everyone has to play by the same Rules."

ARGUMENT

The important purpose of bankruptcy is to provide debtors with a fresh start. *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Thus, the finality of a discharge order is typically binding on creditors who did not object to the proposed plan. But Congress did not treat all debts equally. Congress has specifically made some debts nondischargeable in a Chapter 13 bankruptcy, such as student loans, civil judgments for malicious personal injury and certain municipal tax obligations. *See* 11 U.S.C. § 1328. Indeed, if certain tax debts are to be discharged at all, the debtor is required to take affirmative steps to obtain an order that the debt discharged. *See* Fed. R. Bankr. P. 7001(6). Yet the Ninth Circuit's approval of the passive "discharge-by-declaration" practice allows debtors to avoid otherwise presumptively nondischargeable obligations by willfully ignoring the Rules. This Court should not permit "discharge-by-declaration."

I. THE FAILURE TO REQUIRE AN ADVERSARY PROCEEDING VIOLATED THE BANKRUPTCY CODE AND RULES.

In the case presently before this Court, the debtor's plan proposed discharging a student loan without initiating an adversary proceeding to affirmatively establish "undue hardship." As the Courts of Appeal for the Second, Sixth and Tenth Circuits have held, such actions violate the Code and the Rules. *See Whelton v. Educ. Credit. Mgmt. Corp.*, 432 F.3d 150, 154 (2d Cir. 2005), *In re Ruehle*, 412 F.3d 679, 684 (6th Cir. 2005) and *Educ. Credit. Mgmt. Corp. v. Mersmann*, 505 F.3d 1033, 1049 (10th Cir. 2007). The Ninth Circuit's decision should accordingly be reversed, and the adherence to the Code and the Rules as countenanced by the other Courts of Appeals should be followed.

Section 1328 of the Code specifically precludes certain kinds of debt from being discharged in a Chapter 13 action, including student loan debt. "Unless the debtor *affirmatively* secures a hardship determination, the discharge order will not include a student loan debt." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004) (emphasis added). To secure affirmatively a discharge, the debtor must initiate an adversary proceeding. *Id.* at 451-452. "[A] bankruptcy court lacks authority to confirm a plan provision that seeks to discharge a student loan debt without an adversary proceeding proving 'undue hardship." *Mersmann*, 505 F.3d at 1043. Moreover, a plan in contravention of the Code should not ostensibly be confirmed by the Court on

good faith grounds. 11 U.S.C. § 1325(a)(3) (A bankruptcy court may only confirm a plan if it "has been proposed in good faith and not by any means forbidden by law."). "[T]he inclusion of such a provision in a plan, where it has no legitimacy, constitutes practice by ambush, hardly consistent with the Bankruptcy Court's duty to serve equity." *Whelton*, 432 F.3d at 153 (internal quotation omitted) (holding that "declaration-by-discharge" is inconsistent with the Bankruptcy Code). Any contrary holding "enriches and emboldens those who take what is not theirs and legitimizes it with Court sanction. Those who push past the edge of propriety are rewarded." *Ruehle*, 412 F.3d at 684. Furthermore, upholding "discharge-by-declaration" creates an "ethical conundrum" for the honest practitioner, as debtor's counsel must decide "between (1) zealous advocacy on behalf of their clients and (2) the requirement that they only present good faith, non-frivolous issues." *Mersmann*, 505 F.3d at 1050.

II. THE FAILURE TO REQUIRE AN ADVERSARY PROCEEDING BEFORE DISCHARGING THE DEBT VIOLATED THE DUE PROCESS CLAUSE.

A. The Due Process Standard.

The due process clause requires "notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Moreover, the due process clause requires that notice must be given as,

and to the extent, required by statute. *See City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 297 (1953) ("[C]reditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred."). "This right to be heard has little reality of worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or consent." *Mullane*, 339 U.S. at 314. "[W]here the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect." *Ruehle*, 412 F.3d at 683, quoting *In re Hanson*, 397 F.3d, 482, 487 (7th Cir. 2005) quoting *Banks v. Sallie Mae Servicing Corp.*, 299 F.3d 296, 302 (4th Cir. 2002).

B. The Discharge Of The Student Loan Debt Without An Adversary Proceeding Violated Due Process.

Congress provided that student loans of the type at issue herein may not be discharged without an affirmative showing of undue hardship. *Hood*, 541 U.S. at 450. The Rules, drafted by the Judicial Conference and approved by the Supreme Court and Congress, prescribe the notice and procedure to be followed to initiate an adversary proceeding in order to discharge student loan debt. *See* Fed. R. Bankr. P. 7004. Here the debtor did not follow that procedure. Instead, the debtor circumvented the notice and adversary procedure and simply declared in his

Chapter 13 plan that a portion of the student loan debt would be discharged. The failure to provide notice as required by the Rules means that the resulting plan confirmation is not entitled to preclusive effect. *See Hanson*, 397 F.3d at 487.

C. The Ninth Circuit Stands Alone.

The Courts of Appeal for the Fourth,[5] Sixth[6] and Seventh[7] Circuits have held that the failure to commence an adversary proceeding to discharge a student loan and give notice as provided by the Rules denies the creditor due process and, therefore, the resulting judgment is not entitled to preclusive effect.[8] The Ninth Circuit stands alone in holding to the contrary.

D. The Factors Considered By The Ninth Circuit Do Not Obviate Congressionally Mandated Notice Provisions.

1. Finality Cannot Trump Due Process.

The Ninth Circuit began its analysis in *Espinosa* by citing to the right to modify a final order as delineated in Fed. R. Civ. P. 60(b)(4) and (6). However, the interests of finality "must yield where

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[5] *Banks*, 299 F.3d at 303.

[6] *Ruehle*, 412 F.3d at 684-685.

[7] *Hanson*, 397 F.3d at 487.

[8] Under the Local Bankruptcy Rules in many U.S. jurisdictions, creditors have until thirty days after the Section 341 Meeting to file an objection to confirmation of a Chapter 13 Plan. *See* Bankr. D. Mass. Local Rules, App. R. 13-8. On many occasions the deadline for filing a proof of claim will be after the confirmation order.

the failure to follow the Code and Rules goes to the heart of the creditor's notice of the bankruptcy plan itself." *In re Mersmann*, 503 F.3d at 1050 (student loan nondischargeable where debtor failed to seek discharge by commencement of an adversary proceeding). Although the finality of a confirmation order should be respected, it cannot trump due process concerns and countenance void orders. *Hanson*, 397 F.3d at 486 ("Although we recognize the strong policy favoring finality of confirmation orders, due process entitles creditors to the heightened notice provided for by the Bankruptcy Code and Rules, and the dictates of due process trump policy arguments about finality."). A debtor should not be able to claim a discharge for a debt through the artifice of including a debt in a Chapter 13 plan even though Congress has stated the debt is presumptively nondischargeable and must be contested only in an adversary proceeding.

2. The Misplaced Focus On The Minimum Requirements Of Due Process.

The *Espinosa* decision suggests, in essence, that the plan sufficiently noticed the creditor of the potential loss of an otherwise presumptively nondischargeable claim and that the inquiry ends there. However, the Ninth Circuit's focus on the minimal requirement of due process is misplaced.[9]

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[9] The Ninth Circuit states "we find it both wrong and dangerous to hold that the standard for what amounts to constitutionally adequate notice can be changed by legislation." *Espinosa*, 553 F.3d at 1204. Clearly, Congress may not legislate notice that

Such a limited analysis is appropriate only where Congress has not specifically spoken on the issue of process. Here, Congress has provided more than the constitutional minimum and such additional process cannot be discarded. *Banks*, 299 F.3d at 303, n.4 ("where the Bankruptcy Court and Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect."). *See also City of New York*, 344 U.S. at 297 (1953) ("creditors who have knowledge of a reorganization have a right to assume that statutory 'reasonable notice' will be given them before their claims are forever barred").

3. The Relative "Sophistication" Of The Creditor Does Not Obviate Compliance With Congressionally Mandated Notice.

The Ninth Circuit's emphasis on the creditor's "sophistication" is misplaced. This Court has previously stated that "a party's ability to take steps to safeguard its interests does not relieve [the notifying party] of its constitutional obligation." *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 799 (1983) (holding that due process required more than notice by publication "even though sophisticated creditors have means at their disposal to discover" that their rights had been implicated).

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falls below the constitutional minimum. However, where Congress legislates notice that exceeds the constitutional minimum, the failure to comply with such notice is a denial of due process. *City of New York*, 344 U.S. at 297.

The rationale of *Mennonite Board* has equal application here. Yet in stating that Espinosa's actions did not violate due process, the Ninth Circuit disregarded that maxim:

> We find it highly unlikely that a creditor ***whose business it is to administer student loans*** will be misled by the customary bankruptcy procedures or somehow be bamboozled into giving up its rights by crafty student debtors. If the creditor is notified and fails to object, ***it is doubtless the result of a careful calculation that this course is the one most likely to yield repayment*** of at least a portion of the debt.

Espinosa, 553 F.3d at 1205 (emphasis added). The business sophistication of the creditor should not have played a role in the Ninth Circuit's decision.

Further, the Ninth Circuit's interpretation of the creditor's silence as a calculated business decision is both misplaced and troublesome when applied in different contexts. The viability of the rationale behind ignoring the resources at the creditor's disposal is clearer when the creditor is not, as the Ninth Circuit stated, in the business of administering student loans. When the creditor is not a lender but rather a small town with fewer

resources, the limitations of a "sophistication" argument come to light.[10]

4. The Ninth Circuit's Suggestion That The Creditor Made A "Calculated" Choice Is Not Supported.

The Ninth Circuit suggests several reasons why a creditor would not object to a Chapter 13 that would have the effect of discharging an otherwise nondischargeable student loan. However, the Ninth Circuit fails to address other obvious reasons that a creditor may not object to a Chapter 13 plan. Most notably, a creditor may acquiesce to a Chapter 13 plan based on the statutory requirement that student loans may not be discharged absent an affirmative showing of undue hardship and the provisions of the Rules that such showing be made in an adversary proceeding. Indeed, the official website of the U.S. Courts states that government funded or guaranteed educational loans not fully paid under a Chapter 13 plan are not discharged. *See* U.S. Court Website, Public Information Series, "Bankruptcy Basics: Chapter 13" (April 2006), *http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter13.html*. Silence is thus not always the result of a calculated decision.

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[10] For example, Fed. R. Civ. P. 4(j)(2) requires service on a municipality be made only on its chief executive officer or as otherwise provided by state law and is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7004(a)(1).

CONCLUSION

The requirement of an affirmative showing of undue hardship in an adversary proceeding serves to protect the integrity of the student loan program. The procedural safeguards adopted by Congress cannot and should not be overridden. For the foregoing reasons, the judgment of the Court of Appeal should be reversed and the case remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

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No. 08-1134

In The
Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and Standing Chapter 13 trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the Standing Chapter 13 trustees in the United States are voting members of the NACTT. Kevin Anderson, a Standing Chapter 13 Trustee for the District of Utah and current president of the NACTT, and the NACTT's Board of Directors have directly authorized Henry E. Hildebrand, III, Standing Chapter 13 Trustee for the Middle District of Tennessee, to prepare and submit this *amicus curiae* brief on the NACTT's behalf.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored the brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made any such monetary contribution.

Historically, Congress and federal courts have observed that the more efficient and effective Chapter 13 programs have been conducted by Standing Chapter 13 trustees who exercise a broad range of responsibilities in both the design and effectuation of Chapter 13 plans. *Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). A Chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every Chapter 13 plan. *See* 11 U.S.C. § 1302. A Chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to general creditors. The trustee is empowered to assert claims, avoid preferences, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to the creditors. *Maddox*, 15 F.3d at 1355; *In re Gustav Schaeter Company*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of that money to creditors pursuant to a plan occurs according to the dictates of Congress as set forth in the Bankruptcy Code. *Maddox*, F.3d at 1355.

In consideration of the foregoing, Standing Chapter trustees are in a unique position to objectively argue the issues raised in this review. The *amicus* urges the adoption of the Ninth Circuit's ruling in *In re Espinosa*, 553 F.3d 1193 (9th Cir. 2008), that a final order confirming a Chapter 13 plan should not

be set aside due to the debtor's failure to comply with the procedures dictated by the Bankruptcy Rules. This position is necessary for effective and efficient administration of Chapter 13 cases. Trustees, more than most, rely on the finality of confirmation orders in the administration of cases and disbursement of funds to creditors. Trustees administer nearly $5 billion annually,[2] pursuant to hundreds of thousands of orders in thousands of cases.[3] If these orders are "void" any time the movant does not strictly comply with the notice rules, even when notice is provided, all of the actions of the trustees would be at risk.

The *amicus* asserts that the language of the Bankruptcy Code, its underlying legislative history, and decades of bankruptcy policy support the Ninth Circuit's ruling that a creditor with actual notice of a Chapter 13 Plan is not denied due process even though the creditor is not served with a complaint and summons, even where the impact of such works to discharge a student loan. The NACTT submits that

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[2] The Executive Office for U.S. Trustees disclosed that Chapter 13 trustees distributed $4,969,787,399 in FY 2008. Executive Office for U.S. Trustees, FY-2008 Chapter 13 Trustee Audited Annual Reports, *at* http://www.justice.gov/ust/eo/private_trustee/library/chapter13/docs/ch13ar08-AARpt.xls. Distributions from the states of Alabama and North Carolina were not included in this number.

[3] According to the administrative office of the U.S. Courts, 362,762 Chapter 13 cases were filed in the 2008 calendar year. Press Release, Admin. Office of the U.S. Courts, Bankruptcy Filings Up in Calendar Year 2008, *at* http://www.uscourts.gov/Press_Releases/2009/BankruptcyFilingsDec2008.cfm.

the Ninth Circuit's holding preserves efficient administration of Chapter 13 cases while recognizing the right and obligation imposed on parties to participate in the process. Trustees rely on 11 U.S.C. § 1327, which clearly articulates a sound policy: Confirmation Orders are binding on Chapter 13 debtors, and each creditor, whether or not the creditor is provided for by the Chapter 13 plan, and whether or not the creditor has objected to, accepted, or rejected the plan. To allow a creditor to challenge a confirmation order despite having received actual notice of the order months or years after a trustee has acted in reliance upon the order threatens the structure of the private trustee system.

The integrity and the efficient administration of the hundreds of thousands of Chapter 13 cases filed each year is dependent on this court's affirming the finality of the Confirmation Order free from collateral attack, even by a student loan creditor, where the creditor has received actual notice of a plan.

SUMMARY OF THE ARGUMENT

Under general principles of finality, a court order is binding, subject only to a stay pending appeal or other very limited exceptions. For example, the trial court may grant relief under Rule 60 of the Federal Rules of Civil Procedure if there is error that is not resolvable through appeal. The "finality" of orders

would have little meaning were orders left open to endless reconsideration by a court.

With respect to a Chapter 13 confirmation order, its binding effect rests not only on the general principles of finality, but also on section 1327(a) of the Bankruptcy Code. This statute buttresses the general principle of finality by making a Chapter 13 confirmation order binding on "the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a).

The efficiency and effectiveness of the Chapter 13 bankruptcy process depends on the finality of Chapter 13 confirmation orders. The trustee is charged with administering Chapter 13 cases pursuant to confirmed plans. This involves, among other things, disbursing funds "as soon as is practicable" after confirmation. 11 U.S.C. § 1326(a)(2). Frequently, claims in Chapter 13 cases are relatively small, and a confirmed plan may provide for no distribution to a class of claims, such as unsecured claims. Creditors often choose not to incur the expense of attending meetings of creditors or objecting to confirmation of plans because the cost of doing so outweighs any possible benefit. For this reason, among others, unlike Chapter 11, Chapter 13 is premised on notice and opportunity to object; voting for and acceptance of a plan by impaired creditors is not a condition of confirmation as in 11 U.S.C. § 1129(a). Were creditor voting a requirement, it would be impossible to

confirm many Chapter 13 plans. For this reason, 11 U.S.C. § 1325(a) provides that a plan *shall* be confirmed if the plan meets the requirements specified therein. If creditors have received notice of their opportunity to object together with either the plan or a summary of the plan, and no objection is timely filed, "the court may determine that [a] plan has been proposed in good faith and not by any means forbidden by law without receiving any evidence on such issues." Fed. R. Bankr. P. 2002(b), 3015(d), 3015(f). Congress crafted Chapter 13 and related Rules to ensure, with the oversight of a Chapter 13 trustee, that plans may be confirmed and issues resolved with finality even where no creditor directly participates in the process.

The linchpin of Chapter 13 is the requirement that the trustee and every creditor whose claim may be affected by a confirmed plan receive adequate notice of the contents of a debtor's plan and an opportunity to object to confirmation. In this case, United Student Aid Funds, Inc. ("Petitioner") was a party to the Chapter 13 bankruptcy proceeding. Petitioner received actual notice of the bankruptcy filing, of the contents of the debtor's Chapter 13 plan (including particularly the proposed treatment of Petitioner's claim), notice of its opportunity to object to confirmation, and notice of confirmation (and thereby, notice of the deadline for appealing the order confirming plan). J.A. 34. Petitioner did not object to the plan, nor did it appeal the order confirming plan.

The order is, therefore, binding under both 11 U.S.C. § 1327(a) and the general principles of finality.

An assertion that the bankruptcy court erred in applying the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure might have provided grounds for a timely appeal of confirmation of the plan, but should not provide a basis for invalidating a final order. A party to the bankruptcy proceeding, provided with notice and an opportunity to object and be heard throughout the life of a case, cannot, years later, arbitrarily challenge a Chapter 13 confirmation order, particularly after the plan has been consummated and creditors paid in accordance with the confirmed plan.

The position of the *amicus* does *not* lie in the argument that the bankruptcy court was correct in confirming Mr. Espinosa's Chapter 13 plan; in fact, an objection raised by a creditor, the trustee, or sua sponte by the court should have resulted in a denial of confirmation of the plan. The *amicus*' position lies in the sanctity – the necessity – of orders being final. More than most parties to the bankruptcy process, trustees must act – as fiduciaries administering trusts – based upon the reliability and finality of the orders guiding and governing their actions.

If the principles of *constitutional* due process were violated, the *amicus* concedes that a basis for relief would be present, but the flaws in this case did not result in a denial of constitutional due process. This Court said it best: due process requires "notice

reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Petitioner received notice sufficient to satisfy this standard. Petitioner, in fact, received actual notice, which factually resolves the issue. Pet. Br. at 5. Any argument that due process was denied is negated by the actual receipt of notice.

ARGUMENT

I. A confirmation order is binding under the general principles of finality of orders and the specific statutory finality of confirmation orders under 11 U.S.C. § 1327(a).

Petitioner's primary arguments challenge the finality of the confirmation order on the grounds that the order was not obtained in a manner precisely consistent with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. The relevant question, however, is not whether the order resulted from an error of law or procedure. Rather, it is whether Petitioner is entitled to relief from the effect of the confirmation order, an order that is binding under the general principles of finality of court orders and the specific statutory finality of confirmation orders under 11 U.S.C. § 1327(a).

Petitioner argues that, because the entry of the confirmation order involved errors of law and procedure, the bankruptcy court acted outside of its "authority" such that the confirmation order was void. Pet. Br. at 31-33. Under this argument, however, any error of law or procedure would render an order void; in effect, no legal argument could be waived or forfeited, and confidence in the finality of court orders would become a dead letter. Clearly, this theory cannot stand.

Orders that confirm Chapter 13 plans, when final, dictate the conduct of all parties to the case, and such parties act with, and depend upon, the respect accorded to such orders. Chapter 13 trustees disburse nearly $5 billion per year in reliance upon such orders. Executive Office for U.S. Trustees, *supra*, note 2. If such orders were always subject to reevaluation for compliance with law and procedural rules that do not rise to constitutional requirements, the uncertainty would cripple the Chapter 13 process.

A. This Court has recognized the importance of finality of court orders.

This Court has repeatedly emphasized the importance of the finality of judicial determinations. Although most of the Court's pronouncements to this effect have reflected upon the importance of res judicata, the principles are no less vital in this case.

Petitioner may be correct that a Rule 60 motion (adopted generally as Rule 9024 of the Federal Rules

of Bankruptcy Procedure) does not implicate res judicata because it is a direct rather than a collateral attack on the order,[4] Pet. Br. at 36, but the "practical necessity served by that rule [res judicata]" is nonetheless applicable here. *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2206 (2009). *See* discussion *infra* part I.E.1. (noting the functional similarity

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[4] Although Petitioner argues res judicata does not apply, it also argues that the elements of res judicata are not satisfied. One of Petitioner's arguments is that the elements are not satisfied because the matter was not adjudicated on the merits. Pet. Br. at 37-38. Petitioner, however, participated in the proceeding by filing a proof of claim. J.A. 35. It is not even clear, therefore, that the matter was not adjudicated. Simply because an *issue* was not raised in adjudicating a *claim* does not mean that the adjudication of the *claim* is not res judicata. In any event, an actual trial on the claim is not strictly necessary. "A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default." *Morris v. Jones*, 329 U.S. 545, 550-51 (1947) (quoting *Riehle v. Margolies*, 279 U.S. 218, 225 (1929)); *see also* 18 Moore's Federal Practice § 130.30[3][d] ("A judgment by default may be the basis for claim preclusion to the same extent as any other valid, final judgment.").

Petitioner's other argument is that it did not receive adequate notice, and that the lack of such notice deprived it of a full and fair opportunity to litigate the claim. Pet. Br. at 38-40. This argument is essentially the same as Petitioner's due process argument. As explained in part II, *infra*, the notice Petitioner received was adequate to apprise Petitioner of the proceeding and provide a full and fair opportunity to litigate the claim. Petitioner's complaint, therefore, is not that the notice was fundamentally inadequate to inform Petitioner of the proceeding, but rather that the notice was deficient under the rules.

between the "direct" attack in this case and a traditional collateral attack). A number of decisions, in fact, describe a Rule 60 motion as a "collateral attack." *See, e.g.*, *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800-01 (7th Cir. 2000) ("The rule [Rule 60(b)] governs collateral attack on a final judgment rendered by a federal district court in a civil case; and collateral attack, especially in civil cases, is disfavored because of the social interest in expedition and finality in litigation."). Whether or not this designation is correct, Petitioner's motion in this case presents the same issues of finality that many collateral attacks present. *See id.* at 801 ("A collateral attack on a final judgment [under Rule 60(b)] is not a permissible substitute for appealing the judgment within the time, standardly 30 days, for appealing the judgment of a federal district court. The ground for setting aside a judgment under Rule 60(b) must be something that could not have been used to obtain a reversal by means of a direct appeal." (citations omitted)); *see also* 12 Moore's Federal Practice § 60.22[2] (3d ed. 2009) ("[F]inality of judgments is of great importance and . . . final judgments should not be disturbed lightly. . . . Rule 60(b) is not a substitute for a timely appeal.").

"'[T]he very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination,'" is found only if orders are accorded respect. *Nevada v. United States*, 463 U.S. 110, 129 (1983) (quoting *S. Pac. R.R. Co. v. United*

States, 168 U.S. 1, 49 (1897)). The enforcement of an order is "'essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.'" *Id.* "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

The finality of court judgments applies in this case in the same way it applies in collateral attacks on all court orders. The extent of the finality of an order may not be precisely the same in an attack under Rule 60(b)(4) as in a collateral attack in another court, but in both contexts the exceptions to the binding effect of court orders are limited for the same underlying reasons: parties must be able to rely on court orders and leaving the orders perpetually open to second-guessing (whether by another court or by the same court) would prevent such reliance.

B. The finality of the Chapter 13 confirmation order is based not only on general principles of finality but also on specific statutory provisions.

The finality of orders confirming Chapter 13 plans depends not only on general principles but also on finality accorded by statute. The Bankruptcy Code

provides that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). The Code also imposes strict limits on actions to revoke confirmation orders. *See* 11 U.S.C. § 1330(a); *see also* Br. of *Amicus Curiae* Professor Rafael I. Pardo.

Broadly speaking, "[t]he purpose of section 1327(a) is the same as the purpose served by the general doctrine of res judicata." 8 Collier on Bankruptcy ¶ 1327.02 (15th ed. rev. 2006). But the two are not identical, and the statutory finality that arises from section 1327 applies independently of res judicata principles. "When the enforcement of a confirmation order or discharge order is at issue in the bankruptcy court that issued those orders, res judicata is not in play; rather, the binding effect of confirmation under § 1327(a) is enforced after the discharge through the discharge injunction. . . ." Hon. Keith M. Lundin & Hon. William H. Brown, *From* Szostek *to* Mansaray-Ruffin*: Why* Espinosa *is Right*, 6-2 Norton Bankr. L. Advisor 13 (June 2009).

> It is a well-established principle of bankruptcy law that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan. The reason for this is simple and mirrors the general justification for res judicata principles – after the affected parties have an opportunity to

> present their arguments and claims, it is cumbersome and inefficient to allow those same parties to revisit or recharacterize the identical problems in a subsequent proceeding.

In re Harvey, 213 F.3d 318, 321 (7th Cir. 2000) (citations omitted).[5]

Because the finality of confirmation orders is statutory, it is not limited to the circumstances in which res judicata applies. Regardless of whether res judicata requires actual litigation (based on an "on the merits" element), *see supra* note 4, the finality under section 1327(a) does not require litigation. "The provisions of a confirmed plan bind . . . each creditor, . . . *whether or not such creditor has objected to, has accepted, or has rejected the plan*." 11 U.S.C. § 1327(a) (emphasis added).

Section 1330 also reflects the importance of the finality of confirmation orders, limiting the time within which a court may revoke a confirmation order procured by fraud to 180 days after entry of the order. 11 U.S.C. § 1330(a). This provision has been held to

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[5] While some courts have refused to accord finality to confirmation orders that contain provisions contrary to the Code, here it is rule-created procedures that were violated. Clearly the court has the jurisdiction and the power to find that a student loan is subject to discharge. The method by which the court makes the determination is dictated only by procedural rules. A determination inconsistent with the rule-created procedure does not represent a statutory or constitutional defect.

bar the challenge to a confirmation order other than a challenge based on fraud that is brought within 180 days of entry of the order.[6] *See, e.g.*, *Branchburg Plaza Assoc., L.P. v. Fesq (In re Fesq)*, 153 F.3d 113, 120 (3d Cir. 1998) ("Revoking a confirmation order is a measure that upsets the legitimate expectations of both debtors and creditors. Interpreting Section 1330(a) as a limiting provision permits such disruption in only a very narrow category of egregious cases. [The alternative] approach, on the other hand, would open the courtroom doors to a large number of post-confirmation attacks. Those added challenges could seriously undermine the integrity of the Chapter 13 proceedings, as dissatisfied creditors could seek to drag out the litigation by bringing themselves under Rule 60(b)'s broader rubric in an attempt to extract concessions."). Even if section 1330 does not entirely preclude other actions to revoke a confirmation order, Rule 9024 of the Federal Rules of Bankruptcy Procedure appears to impose the 180-day limit from section 1330 on any complaint to revoke a confirmation order. *See* Br. of *Amicus Curiae* Professor Rafael I. Pardo at 12-14. Both section 1330(a) and Rule 9024, therefore, reflect what Professor Pardo correctly describes as a congressional policy of giving an "accelerated degree of finality" to confirmation orders. *Id.* at 18.

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[6] Section 1328(e) provides a similar limitation on revocation of a discharge order. *See* 11 U.S.C. § 1328(e).

C. The finality of the Chapter 13 confirmation order is vital to the Chapter 13 system.

In the Chapter 13 bankruptcy system, the finality of the confirmation order is a necessity. The confirmation order sets terms on which trustees, creditors, and debtors rely. The small size of many of the claims in Chapter 13 cases may limit, as a practical matter, direct participation in the confirmation proceedings. The system, accordingly, was designed to operate, and operates efficiently, on notice and opportunity to object. For it to function effectively, objections raised by any party can be effectively presented, but, once approved, confirmation orders must be binding on all parties with notice.

"Confirmation is the bright line in the life of a Chapter 13 case at which all the important rights of creditors and responsibilities of the debtor are defined and after which all rights and remedies must be determined with reference to the plan." Keith M. Lundin, Chapter 13 Bankruptcy, § 228.1 (2000 & Supp. 2004). Because of the function of the confirmation proceeding in the Chapter 13 process, the finality of the confirmation order is vital to the effectiveness and efficiency of the system. *See id.* ("[I]n some circuits debtors and creditors can't count on § 1327 to produce finality of rights and responsibilities in Chapter 13 cases with great enough certainty to ensure a reliable and efficient Chapter 13 program. The uncertainty that results from judicial limitations on the effects of confirmation under

§ 1327 increases the cost of Chapter 13 for debtors and creditors and distorts the natural selection of chapters by consumer bankruptcy attorneys."); *see also Educ. Credit Mgmt. Corp. v. Robinson (In re Robinson)*, 293 B.R. 59, 65 (Bankr. D. Or. 2002) (recognizing "Congress' acknowledgement that confirmation orders are indeed different than other orders").

> [A] confirmed plan acts more or less like a court-approved contract or consent decree that binds both the debtor and all the creditors. Bringing the various creditors' interests to the table once is difficult enough; permitting one of the creditors to launch a later attack on a confirmed plan would destroy the balance of interests created in the initial proceedings.

In re Harvey, 213 F.3d 318, 321 (7th Cir. 2000). "There must be finality to a confirmation order so that all parties may rely upon it without concern that actions which they may thereafter take could be upset because of a later change or revocation of the order." *Mersmann v. Educ. Credit Mgmt. Corp. (In re Mersmann)*, 505 F.3d 1033, 1047 (10th Cir. 2007) (quoting 4 Collier on Bankruptcy ¶ 523.14[1] (15th ed. rev. 2006)). "This is the objective of the confirmation process, to achieve finality." *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007); *see also Adair v. Sherman*, 230 F.3d 890 (7th Cir. 2000) (referring to the "finality that bankruptcy confirmation is intended to provide"). As the Third Circuit recognized, "creditors would not participate in reorganization if

they could not feel that the plan was final," and "it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constitute the basis of its earlier acceptance." *In re Szostek*, 886 F.2d 1405, 1409 (3d Cir. 1989) (quoting *In re Penn Cent. Transp. Co.*, 771 F.2d 762 (3d Cir. 1985)).[7] Similarly:

> It would hardly serve the purposes for which the federal bankruptcy laws were intended to permit a dissatisfied creditor to withhold its opinion of the practicality and fairness of a debtor's plan until after that plan has been completed. At such a late point in time, a meaningful modification of the plan is difficult, if not impossible, and the objecting creditor is in a position to circumvent the protective shield provided debtors under Chapter 13.

In re Gregory, 19 B.R. 668, 670 (B.A.P. 9th Cir. 1982).

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[7] The Third Circuit later clarified that "while *Szostek* does note the importance of finality, it recognizes that the policy of finality must yield to the principle that a plan cannot violate a mandatory provision of the Code." *SLW Capital, LLC v. Mansaray-Ruffin*, 530 F.3d 230, 238 (2008). The court went on to find that an adversary proceeding is mandatory in order to invalidate a lien, based on principles of due process (not a mandatory Code provision). As explained in part II, *infra*, the determination of dischargeability in this case did not violate due process.

The finality of the confirmation order is imperative to the proper functioning of the Chapter 13 system. The bankruptcy system is designed to facilitate an organized administration of a debtor's estate. Doing so requires a determination of the rights and responsibilities of debtors and creditors, accomplished in a Chapter 13 case largely through the confirmation order. If a creditor with constitutionally adequate notice can ignore the proceedings and, years later, raise standard objections, this system cannot function effectively.

D. The ramifications of denying the finality of a confirmation order based on inconsistencies with the rules of procedure are potentially severe.

The heart of Petitioner's argument for relief from the confirmation order is that Mr. Espinosa did not establish the dischargeability of his student loan debt through an adversary proceeding, as required by the Federal Rules of Bankruptcy Procedure. *See* Pet. Br. at 25-26. A holding that a confirmation order is void because of noncompliance with the Rules of Procedure has potentially severe ramifications.

Plan confirmation procedures are often combined with associated motions, especially motions to value collateral for purposes of claim splitting.[8] Although

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[8] The valuation of collateral can lead to the bifurcation of a claim into a secured claim in the amount of the value of the

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the Bankruptcy Code permits the determination of the value of collateral to be made in conjunction with the plan confirmation proceedings, 11 U.S.C. § 506(a), the Rules require heightened notice: the valuation determination is a motion proceeding, *see* Fed. R. Bankr. P. 3012, and Rule 9014(b) requires motions initiating contested matters to be served as prescribed in Rule 7004, the rule governing the service of adversary proceedings, *see* Fed. R. Bankr. P. 9014(b). If a failure to comply with the detailed procedural requirements of Rule 7004 renders the associated orders void, not just voidable, even where actual notice is effected, then many confirmed plans – and actions taken upon those plans – will be at risk.

Further, Petitioner's argument – that the effect of confirmation of the plan should be ignored because the questionable provision was not effected by an adversary proceeding – ignores the reality that there is no difference in the way that a plan or an adversary is delivered – by first class mail. While one mailed document may say "summons," one may say "motion," and one may say "plan," the title of the

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collateral and an unsecured claim for the remainder. 11 U.S.C. § 506(a). Such "claim splitting" allows a debtor to "require the lienholder to accept the present value of the property in full satisfaction of the lien even if the total debt exceeds the value of the property." Keith M. Lundin, Chapter 13 Bankruptcy, § 105.1 (2000 & Supp. 2004). Most courts apply the same process to junior liens that are wholly unsecured to strip the lien entirely. *See* William L. Norton, Norton Bankruptcy Law and Practice 3d, § 149:7 (database updated July 2009).

document received cannot be the basis for a denial of process.

As the officer principally charged with implementing a confirmed Chapter 13 plan, the trustee must distribute trust funds pursuant to the plan. 11 U.S.C. § 1326(a)(2). Petitioner argues that having to actually read the notices provided would impose a heavy burden. Pet Br. at 48. Failing to accord finality to the order because it did not result from a proceeding designated an "adversary proceeding" or marked with the word "summons" or not mailed "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process" is unwarranted; such flaws do not merit a wholesale undoing of orders. Tens of thousands of orders relating to plan confirmation, claims allowance and classification, and lien avoidance are entered each month in bankruptcy cases – particularly Chapter 13 cases. If such orders are subject to being "void," as argued by Petitioner, the entire credibility and certainty of consumer bankruptcy cases would be jeopardized. Certainly the risk of a loss of finality is a far greater price than expecting a party to a case to read the notice provided.

E. Petitioner's statutory argument is inconsistent with the finality of the confirmation order because the argument implies that any error of law or procedure provides grounds for relief.

Finality of court orders and the binding effect of confirmation under section 1327(a) require that an error in a confirmation order, whether procedural or substantive, may stand when a party fails to object. That possibility is at the heart of the concept of finality. *Cf. United States v. Moser*, 266 U.S. 236, 242 (1924) ("[A] fact, question, or right distinctly adjudged in the original action cannot be disputed in a subsequent action even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based."). Petitioner, therefore, must do more than just establish a legal or procedural error in the bankruptcy court's confirmation order. It must establish some exception to the general and statutory finality of the confirmation order. Most of Petitioner's brief, however, addresses only the former issue, arguing that the confirmation order is inconsistent with the Bankruptcy Code and Rules.

1. An order is not void simply because it involves an error of law or procedure.

Under Rule 60 of the Federal Rules of Civil Procedure, made applicable by Rule 9024 of the Federal Rules of Bankruptcy Procedure, a court "may relieve a party or its legal representative from a final judgment, order, or proceeding" for several specified reasons, including that "the judgment is void." Fed. R. Civ. P. 60(b)(4); Fed. R. Bankr. P. 9024. Relying on this rule, Petitioner argues that the discharge of student loan debt through the confirmation order and subsequent discharge order is "void" because the action is "beyond the court's authority." Pet. Br. at 13.

Petitioner argues that the confirmation order violated the statute and the rules in several respects, but the arguments all suffer from the same flaw. They treat an order that is inconsistent with the statute, or even the rules of procedure, as beyond the court's authority. This argument significantly overstates the circumstances in which an order is "void."

> "[A] judgment is void, and therefore subject to relief under Rule 60(b)(4), *only* if the court that rendered it lacked jurisdiction or in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process." (emphasis in original). A judgment is not void simply because it is wrongly decided.

12 Moore's Federal Practice § 60.44[1][a] (3d ed. 2009) (footnotes omitted) (quoting *United States v. Boch*

Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990)). Such a rule is required to confer legitimacy and justify reliance upon the Chapter 13 process. Otherwise, almost any error would render a confirmation order void: taking Petitioner's argument at face value, a court would not have had the "authority" to enter an order that was based on an error of law or procedure. This theory would eliminate the finality of orders approving Chapter 13 plans, orders that are entered and are rendered final by statute.

Even when the "authority" that a court exceeds is as fundamental as subject matter jurisdiction, the principles of finality significantly limit the ability to revisit a final order. "In the context of Rule 60(b)(4), a lack of subject-matter jurisdiction for the purpose of making a judgment void means a court's lack of jurisdiction over an entire category of cases, not whether a court makes a proper or improper determination of subject-matter jurisdiction in a particular case." 12 Moore's Federal Practice § 60.44[2][a] (3d ed. 2009).

In *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009), in circumstances similar to the circumstances here, the Court held that "the need for finality forbids a court called upon to enforce a final order to 'tunnel back . . . for the purpose of reassessing prior jurisdiction de novo'" *Travelers*, 129 S. Ct. at 2206 (quoting *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1308 (11th Cir. 2005)). *Travelers* involved a collateral attack, but its holding is instructive in this case, even if Petitioner's attack on

the confirmation order is properly labeled a "direct" attack. The distinction between the collateral attack in *Travelers* and the "direct" attack under Rule 60(b) in this case is largely superficial.

In *Travelers*, the insurer sought enforcement of a bankruptcy court's prior orders, requesting that the court enjoin state court actions that Travelers contended violated the prior orders, described as the "1986 Orders." *Travelers*, 129 S. Ct. at 2200. The court of appeals reversed the bankruptcy court's order clarifying its 1986 Orders, holding that the bankruptcy court had exceeded its jurisdiction in the 1986 Orders. *Id.* at 2202. This Court reversed, holding that "once the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became res judicata." *Id.* at 2205.

In this case, the issue arose in a substantially similar manner. Mr. Espinosa moved to reopen his bankruptcy case and sought enforcement of the discharge injunction. Resp. Br. at 6-7. As in *Travelers*, therefore, the issue arose when a party to a court's prior orders sought to enforce the prior orders in the same court – in *Travelers*, the prior orders were the 1986 Orders; in this case, the prior orders were the confirmation order and the discharge order.[9] And, as

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[9] The original discharge order excepted Mr. Espinosa's student loan debts from discharge, but only because of a clerical error, later corrected by the bankruptcy court. J.A. 48.

in *Travellers*, the challenge to the prior orders was based on the alleged invalidity of the prior orders – in *Travelers*, invalidity because the court exceeded its subject matter jurisdiction; in this case, invalidity because the court exceeded its "authority." The difference between these asserted bases for holding the prior orders void is marginal, at best. In fact, Petitioner's original argument before the bankruptcy court was the same as the basis asserted in *Travelers*, that the bankruptcy court had lacked subject matter jurisdiction.[10] Resp. Br. at 6.

In short, the "collateral" attack on the 1986 Orders in *Travelers* was functionally the same as the Rule 60 motion in this case. In both instances, the attack was raised as a response to an action to enforce prior bankruptcy court orders, and in both instances, the proceedings to enforce the prior orders were before the court that issued the orders. Designating an attack on a confirmation order a "direct" attack should not provide an end-run around the vital finality of the confirmation order, especially when the attack is (like the collateral attack in *Travelers*) based on grounds that could have been raised in the original

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[10] Petitioner also alleges invalidity on the grounds that it did not receive notice sufficient to satisfy constitutional due process. *Travelers* did not hold that the necessity of finality would trump such invalidity. *Travelers*, 129 S. Ct. at 2207. As explained in part II, *infra*, however, Petitioner was not denied constitutional due process.

proceeding but were instead raised only long after the fact.

Petitioner argues that the Ninth Circuit's ruling contradicts the self-executing nature of section 523(a)(8) and, similarly, that it improperly shifts the burden of raising the issue of dischargeability from the debtor to the creditor. (The United States, as *amicus*, asserts similar arguments, *see* Br. for the United States at 13-23, but does not mention Rule 60 at all, leaving somewhat unclear what the asserted basis is for relief from the final confirmation order.) These arguments, however, do not establish that the court acted beyond its authority. A bankruptcy court has authority to determine dischargeability of student loan debts, *see* 11 U.S.C. § 523(a)(8), and to confirm a Chapter 13 plan, *see* 11 U.S.C. § 1325. That fact distinguishes this case from the cases cited by Petitioner, like *United States ex rel. Wilson v. Walker*, 109 U.S. 258 (1883), in which the court entered a decree "not within the powers granted to the court." *Id.* at 266. In this case, the bankruptcy court may have erred in its *exercise* of its authority, but it did not act without authority, such that its actions were void. An error in exercising that authority is not relevant at this stage of the proceedings. Such an error could have been raised as an objection to the plan and, if necessary, in an appeal from the confirmation order. But because of

the vital importance of the finality of confirmation orders, the objection cannot be raised now.[11]

The same reasoning applies to Petitioner's arguments concerning sections 1322(b)(11) or 1325(a)(1). Pet. Br. at 27-30. Those sections do not define the court's "authority," such that an inconsistency with the provisions would render the order void. Extending Petitioner's argument, in fact, reveals its impracticability. If sections 1322(b)(11) and 1325(a)(1) limited a court's "authority" to confirming plans that comply with the provisions of the Bankruptcy Code, then any confirmation order that involved an erroneous application of the Code would be void. Such a rule would leave confirmation orders perpetually subject to attack. No statutory argument would ever be waived or forfeited.

The bankruptcy court's action in this case was not beyond the court's authority under the Bankruptcy Code. Section 523(a) does not preclude a discharge of student loan obligations; it simply limits

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[11] Justices Breyer and Ginsburg have both recognized a similar point in the context of motions under Rule 60(b)(5). *See Horne v. Flores*, 129 S. Ct. 2579, 2618 (2009) (Breyer, J., dissenting) ("A party cannot use a Rule 60(b)(5) motion as a substitute for an appeal, say, by attacking the legal reasoning underlying the original judgment or by trying to show that the facts, as they were originally, did not then justify the order's issuance."); *Agostini v. Felton*, 521 U.S. 203, 257 (1997) (Ginsburg, J., dissenting) ("[R]elitigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom").

the discharge to cases in which "excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). It is the Rule, not the statute, that requires the dischargeability determination to be in an adversary proceeding. *See* Fed. R. Bankr. P. 7001(6). Rules govern procedural matters, not the court's "authority." *See* Fed. R. Civ. P. 1001 ("The Bankruptcy Rules and Forms govern *procedure* in cases under title 11 of the United States Code." (emphasis added)); *cf. Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (holding that filing deadlines in the Bankruptcy Rules are "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate").

A bankruptcy court has authority under the statute to determine dischargeability of student loan debts. It is not a credible argument that the bankruptcy court did something outside its authority. At most, the court erred in the exercise of its authority. Such an error provides grounds for objection and appeal but does not invalidate the order.

2. Respecting the finality of the confirmation order does not require approval of the practice of providing for discharge of nondischargeable debts through Chapter 13 plans.

Though the demand for finality of confirmation orders requires the orders to be binding even when

they are not consistent with the Bankruptcy Code or the Rules of Procedure, it does not require approval of practices that create such inconsistencies. *Amicus* here does not contend that the bankruptcy court should have confirmed Mr. Espinosa's plan, only that confirmation created a final order that was binding subject only to limited exceptions.

The Court need not undermine the vital finality of the confirmation order in an effort to address abuse of the confirmation process. Courts have alternative means of dealing with such issues. This Court, in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), recognized a similar point. Rejecting the argument that the need to prevent abusive claims of exemptions required allowing a trustee to raise untimely objections, the Court noted that "[d]ebtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings." *Id.* at 644. Some courts, in fact, have announced policies of treating attempts to discharge student loan debt through Chapter 13 plan provisions as sanctionable conduct. *See, e.g.*, *In re Gardner*, 287 B.R. 822, 826 (D. Kan. 2002); *In re Hensley*, 249 B.R. 318, 322-23 (Bankr. W.D. Okla. 2000); *see also In re Lemons*, 285 B.R. 327, 332-33 (Bankr. W.D. Okla. 2002) (imposing sanctions); *In re Evans*, 242 B.R. 407, 413 (Bankr. S.D. Ohio 1999) (ordering debtor's attorney to show cause why inclusion of student loan addendum did not violate Rule 9011(b)). Whether or not such sanctions are merited – the Ninth Circuit concluded that the resolution of the issue through the

plan confirmation process was efficient, and that courts "have no business standing in the way," *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1205 (9th Cir. 2008) – the availability of the sanctions diminishes the need to invalidate confirmation orders as a means of addressing the issue.

II. The determination of dischargeability in this case did not deny Petitioner constitutional due process.

Petitioner argues that an order confirming a Chapter 13 plan, containing the questionable provision, denied it due process. Pet. Br. at 51-58. Petitioner, however, was not denied due process of law. Petitioner received actual notice of the bankruptcy proceeding and notice of the specific plan terms, Pet. Br. at 5, and acted upon that notice by filing a proof of claim in response to the plan, *id.* at 7. As a party with notice, Petitioner had an opportunity to be heard. Had it raised an objection to the debtor's plan, Petitioner easily could have obtained a hearing on the dischargeability of the debt. *Amicus* agrees that, had Petitioner raised such an objection, the debtor's plan, almost certainly, would not have been (and should not have been) confirmed.

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314

(1950). Petitioner received notice sufficient to satisfy the *Mullane* standard: Petitioner acknowledges that "[a] copy of Mr. Espinosa's plan was mailed to (and received by) USA Funds" at the address used to receive loan payments, Pet. Br. at 5, and that Petitioner received additional notice related to the incompatibility of its claim with the plan, *id.* at 8.

Petitioner, moreover, received actual notice. It was clearly apprised of the proceeding and participated in the payments by filing a proof of claim. Actual notice satisfies constitutional due process. The question of fundamental fairness that *Mullane* and its progeny address is whether a proceeding should be binding on a party in the absence of assurances that the party is actually apprised of the proceeding. *See Mullane*, 339 U.S. at 319 ("The reasonableness, and hence the constitutional validity of, any chosen method may be defended on the ground that it is, in itself, reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." (citations omitted)); *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) ("[W]e have allowed judicial proceedings to be prosecuted in some situations on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service. But we have also clearly recognized that [in such cases] the Due Process Clause does prescribe a constitutional minimum. . . ."). When a party *is* actually apprised of the

action, the question of the reasonableness of the notice as a means of apprising the party is resolved.

Petitioner is arguing for more than just notice, or even actual notice. It is arguing that constitutional due process requires precise compliance with the Federal Rules of Bankruptcy Procedure. This argument gives the force of constitutional due process to the Rules of Bankruptcy Procedure. These are two different tests, however, and the consequences of failing to satisfy them differ. Due process establishes basic requirements for a deprivation of life, liberty, or property by adjudication to be binding. These requirements are fundamental, and they do not vary with changes to the Rules of Bankruptcy Procedure. The fundamental nature of due process requirements means that a proceeding that fails to satisfy the requirements is invalid. The Rules of Bankruptcy Procedure, however, are not so fundamental. They provide rights to the parties that, in order to be enforced, must be enforced in a timely manner. The significance of a failure to comply with the Rules of Bankruptcy Procedure is different than the significance of a failure to provide due process of law.

This Court recognized the distinction between the requirements of due process and the requirements of the Rules of Bankruptcy Procedure in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2003), noting that "[t]he text of § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion . . . which would raise no constitutional concern." *Id.* at 453. In other words,

the Court recognized the obvious point that due process establishes fundamental requirements, onto which the Rules of Bankruptcy Procedure may add additional requirements. Such additional requirements, however, do not have the force of the fundamental requirements of due process. The Court in *Hood* had no cause to note the distinction, but Petitioner cannot seriously contest it.

Petitioner is complaining about rule noncompliance, not constitutional due process failures. The Rules of Bankruptcy Procedure, not the Constitution, require an adversary proceeding, initiated by a complaint and summons, served in a specified manner. *Hood* clearly states that the adversary proceeding, with complaint and summons, is not a constitutional requirement. The fact that Petitioner did not receive a complaint and summons, served in accordance with Rule 7004, therefore, does not establish a due process violation; at most, it establishes a rule violation. The time for objecting to rule violations, however, has long since passed.

Petitioner received notice that apprised it of the proceeding that determined the dischargeability of a portion of Mr. Espinosa's debt. The proceeding, therefore, satisfied the fundamental requirements of constitutional due process, the basic requirements necessary to make an adjudication binding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 08-1134

IN THE

Supreme Court of the United States

UNITED STATES AID FUNDS, INC.,
Petitioner,

v.

FRANCISCO J. ESPINOSA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF AMICUS CURIAE*

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,300 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 800,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed amicus curiae briefs in various courts seeking to protect the rights of consumer bankruptcy debtors.

NACBA and its membership have a vital interest in the outcome of this appeal, as member attorneys represent individuals in a large portion of all chapter 13 cases filed. Debtors and their attorneys must be able to rely on the finality of confirmation orders. The hard work that debtors put into keeping

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* This brief is filed with the consent of the parties, and letters of consent have been filed with the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, Amicus affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or other Amici or Amicis' counsel made such a monetary contribution.

up with obligations under their plans will be undercut if years later, even after the debtor has faithfully carried out all plan terms, the entire process can be reversed. If Petitioner's arguments challenging the finality of chapter 13 plan confirmation orders prevail, chapter 13 debtors and the attorneys representing them will face uncertainties over what will be expected of them in the long term future, including the potential for unforeseen costs that struggling debtors can ill afford.

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INTRODUCTION

This appeal arises from a dispute over a relatively small amount of money, approximately $4,500 in interest and penalties that were part of a student loan debt. Petitioner's arguments, however, have far reaching implications. Petitioner raises a fundamental challenge to the rule of finality that applies to all court judgments and that applies with particular force to bankruptcy court orders confirming reorganization plans. The mutual understandings and expectations of a multitude of stakeholders are embodied in a final bankruptcy court order that confirms a plan. This appeal raises the question of whether those shared understandings and expectations can be undone with relative ease years later by a single creditor who belatedly decides to challenge a plan. The answer will have a direct impact upon the hundreds of thousands of individuals, including small business owners, who seek chapter 13 relief, family farmers reorganizing under chapter 12, and all businesses that seek a new start in chapter 11.

The implications of Petitioner's arguments extend well beyond bankruptcy and commercial law. Petitioner challenges some of the fundamental doctrines that permit a judicial system to function effectively. These include the finality of judgments, *res judicata*, the enforceability of default judgments, and adherence to time deadlines.

SUMMARY OF ARGUMENT

Petitioner USAF filed an objection to confirmation of Mr. Espinosa's chapter 13 plan ten years after the bankruptcy court entered an order confirming the plan as in compliance with the Bankruptcy Code. Although the confirmation order had become final a decade earlier and Mr. Espinosa had paid the full loan principal as his plan required, USAF contended in its belated objection that a term of the plan was inconsistent with a bankruptcy rule. Before the bankruptcy court approved the plan, USAF had notice of the plan term in question and had the opportunity to argue the rule's applicability. USAF's untimely objection flies in the face of two bedrock principles of finality, one statutory and the other judicially created.

Bankruptcy Code sections 1327(a), 1329 and 1330(a) embody a strong Congressional policy mandating finality of chapter 13 plan confirmation orders, creating a finality rule that is broader than the *res judicata* standard the courts apply outside of bankruptcy. USAF directly attacks the plan confirmation order here under F.R. Civ. P. 60(b), claiming that the order was "void." Pursuant to 11 U.S.C. § 1330(a), an action to revoke a chapter 13 plan confirmation order may be brought only on the basis of fraud. USAF has never alleged fraud in connection with the confirmation of Mr. Espinosa's plan. Section 1330(a) and F.R. Bankr. P. 9024 require that an action to revoke a plan confirmation order be commenced within 180 days of the order's date of entry. USAF's motion clearly failed to meet this require-

ment. If approved, USAF's use of Rule 60(b) would effectively repeal chapter 13's core finality provisions, sections 1327(a) and 1330(a). Such a ruling would also eviscerate the almost identical provisions applicable in chapters 11 and 12.

Substantial precedent from this Court and the Courts of Appeals recognizes that a bankruptcy court's plan confirmation order has the same preclusive effect as any final judgment of a federal court. This Court's rulings apply *res judicata* to bar attacks on the finality of a plan confirmation order when the challenge raises a claim that the bankruptcy court acted without subject matter jurisdiction when it approved a plan. If *res judicata* precludes an untimely challenge raising lack of subject matter jurisdiction, it certainly bars one raising non-compliance with a court rule.

Because finality and *res judicata* clearly precluded USAF's untimely challenge to the confirmation order here, USAF sought to avoid these barriers by focusing on the issue of notice. However, there are significant gaps and inconsistencies in USAF's notice arguments. USAF has not alleged that Mr. Espinosa's plan confused its litigation staff when they received it. USAF suffered no concrete prejudice from the lack of an adversary proceeding filing. Instead, USAF's notice arguments are based solely on conjecture about how a hypothetical student loan creditor could possibly be confused by inclusion of the discharge term in a plan and therefore might neglect to protect its rights.

The briefs of USAF and other guaranty agencies indicate that they do not read chapter 13 plans they receive from debtors and the courts. In effect, the agencies create their own notice problem. This practice is contrary to Department of Education regulations, which require that the agencies review plans and object when appropriate. Taxpayers, creditors, and debtors will be better served if guaranty agencies do the jobs for which they are paid and review bankruptcy plans with due care.

The Fourth, Sixth, and Seventh circuits erroneously held that there is a constitutional right to enforce federal bankruptcy rules. The bankruptcy rules are indeed enforceable, but requests to enforce them must be made at the appropriate time and place. For USAF, the time and place to argue its point was at the plan confirmation hearing in 1993, not in a motion filed in 2003.

In connection with its appeals USAF has raised a number of issues that this Court simply need not address at this time. These include the question of whether F.R.Bankr. P. 7001(6) mandates an adversary proceeding for student loan discharge determinations and whether Code section 1328(a)(2) precludes discharge of student loan debt through the terms of a chapter 13 plan. These issues were never litigated in the proceedings below. They should be addressed on the basis of a record where parties have properly raised and argued the issues.

ARGUMENT

I. USAF'S CHALLENGE TO THE FINALITY OF PLAN CONFIRMATION ORDERS THREATENS THE STABILITY OF ALL REORGANIZATION BANKRUPTCIES

A. Statutory Finality – Provisions of the Bankruptcy Code Embody a Strong Policy Against Vacating a Plan Confirmation Order

Subject to limited exceptions, bankruptcy courts must confirm chapter 13 plans that meet the nine criteria listed in Bankruptcy Code section 1325(a). Subsection (1) of section 1325(a) requires that the court find "the plan complies with the provisions of this chapter and with the other applicable provisions of this title." Subsection (3) of section 1325(a) requires that the court find "the plan has been proposed in good faith and not by any means forbidden by law." In the instant case the bankruptcy court found that these and the remaining criteria were met. It confirmed Mr. Espinosa's chapter 13 plan in 1993. In that plan he sought and received discharge of a portion of interest and penalties due on his student loan debt. He paid the loan principal in full under the terms of his plan.

In 2003, a decade after confirmation of the plan and well after Mr. Espinosa had embarked upon the "fresh start" that is a cornerstone of bankruptcy law, USAF filed a motion with the same bankruptcy court asking that the court revoke its

1993 confirmation order. USAF asserted for the first time that it believed the plan did not comply with chapter 13 and other Code provisions, contending that the plan had been proposed by means forbidden by law. USAF raised these claims even though, prior to confirmation in 1993, it had received timely notice of all terms of Mr. Espinosa's proposed plan and of its right to object to confirmation. At that time, USAF could have requested a hearing and brought its objection to the court's attention. USAF chose to refrain from objecting and allowed the bankruptcy court to confirm the plan. All claims USAF raised for the first time in 2003 fell squarely within the scope of objections the bankruptcy court could have ruled upon under section 1325(a) ten years earlier when it entered the confirmation order.

USAF brought its proceeding to revoke plan confirmation not only long after the bankruptcy court's order had become final, but also well after the terms of the five-year plan had been fully performed. To ensure that bankruptcy reorganizations are not disrupted in this way Congress enacted three statutory provisions securing the finality of chapter 13 plan confirmation orders.

First, Bankruptcy Code section 1327(a) declares the finality of a plan confirmation order on the debtor and every creditor, including any creditor who did not object to confirmation:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is pro-

> vided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

Second, section 1329 defines the circumstances under which a confirmed plan may be modified during the period of plan performance. 11 U.S.C. § 1329. This section permits modification only for limited reasons, primarily to adjust payment levels under the terms of the confirmed plan. The allowable grounds for modification do not include general claims of non compliance with the Bankruptcy Code, which must be addressed at the time of confirmation under section 1325(a). Only changed circumstances occurring after the plan confirmation can support modification, and modification cannot occur after the completion of plan payments. *In re Storey*, 392 B.R. 266 (B.A.P. 6th Cir. 2008).

Third, section 1330 defines when a creditor may seek to revoke a plan confirmation order once it has become final, setting stringent substantive and temporal limits upon such a challenge:

> On request of a party in interest at a time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

USAF did not allege fraud as a basis to revoke the 1993 confirmation order. Nor did it commence a pro-

ceeding to revoke the confirmation order within 180 days after the date of the order's entry. Thus, in 2003, USAF was barred from bringing any proceeding seeking revocation of the 1993 order of plan confirmation in Mr. Espinosa's case on the ground that the plan had not complied with the Bankruptcy Code.

Section 1330(a) and F. R. Bankr. P. 9024[1] impose substantial limits on the use of Rule 60(b)-type motions to attack plan confirmation orders. USAF cannot evade section 1330(a)'s substantive and temporal limits by labeling its proceeding a motion under Rule 60(b) to declare a confirmation order "void." *In re Fesq*, 153 F.3d 113 (3d Cir. 1998), *cert denied* 526 U.S. 108 (1999); *In re Valenti*, 310 B.R. 138, 147 (B.A.P. 9th Cir. 2004); 8 *Collier on Bankruptcy* ¶ 1330.01[2] (Alan A. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2009); 3 Keith M. Lundin, *Chapter 13 Bankruptcy* § 223.1 (3d ed. 2006). A contrary rule would render section 1330 meaningless. Finally, F.R. Bankr. P. 7001(5) defines a proceeding to revoke plan confirmation as an "adversary proceeding." Ironically, USAF's Brief did not note its own failure to follow Rule 7001 in its filing.

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[1] F.R. Bankr. P. 9024 provides: "Rule 60 F.R. Civ. P. applies in cases under the Code except that . . . (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330." Rule 60 itself is not directly applicable in bankruptcy cases. Fed. R. Bankr. P. 1001.

B. *Res Judicata* – The Overwhelming Weight of Judicial Precedent Supports Enforcement Of An Order Confirming A Bankruptcy Reorganization Plan Regardless Of Clear Error In Granting the Order

The Congressional policy mandating finality, embodied in Bankruptcy Code sections 1327(a), 1329, and 1330(a) is nothing new. While these statutory provisions bar direct attacks upon orders confirming bankruptcy reorganization plans, courts impose their own limits on indirect or collateral attacks upon these orders under the judicially created doctrine of *res judicata*.

1. The Supreme Court's *Res Judicata* Precedent

USAF seeks to set aside seventy years of precedent upholding the finality of bankruptcy court orders confirming reorganization plans. *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195, 2205-06 (2009); *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). In each of these cases parties raised claims that the bankruptcy courts had erred in confirming the plans. The alleged errors were fundamental, going to whether the bankruptcy courts had subject matter jurisdiction to enter the orders. In each case litigants sought to proceed with collateral actions that were barred by the bankruptcy court orders. They argued that the orders were invalid because the

bankruptcy courts had acted without authority. In each instance this Court, applying the doctrine of *res judicata*, held that the plan confirmation orders were final judgments of the federal courts, and barred the collateral attacks.

In upholding the finality of the bankruptcy court confirmation order in *Stoll v. Gottlieb*, the Court assumed that the complaining creditors were correct and that "the Bankruptcy Court did not have jurisdiction over the subject matter of the order" (the release of a noncreditor guarantor). 305 U.S. at 171. Nevertheless, the Court held that the bankruptcy court did have authority to determine its jurisdiction over the subject matter and the parties, and once the order became final, *res judicata* precluded any further inquiry into jurisdictional errors. *Id.* at 171-72.

Most recently, in *Travelers Indemnity Co. v. Bailey*, several parties sought to pursue claims in 2004 that were precluded by a Chapter 11 plan confirmation order entered in 1986. In rejecting the challenge to the bankruptcy court's jurisdiction to approve the plan, the Court stated, "whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 and is not properly before us." 129 S. Ct. at 2203. The same is true here. The question of whether the bankruptcy court had authority to confirm Mr. Espinosa's plan in 1993 was not properly before the Court of Appeals for the Ninth Circuit in 2008, and it is not properly before this Court now.

The *Travelers* decision defined the *res judicata* doctrine in its standard form - to preclude claims that were actually raised in the earlier proceeding, as well as claims that could have been raised then, but were not. As this Court stated, the plan confirmation order was final, "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but *as to any other admissible matter which might have been offered for that purpose.*" *Travelers*, 129 S. Ct. at 2205 (emphasis added) (quoting *Nevada v. United States*, 463 U.S. 110, 130 (1983), quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877). *Res judicata* serves an essential pragmatic purpose in declaring a clear end to litigation. "[T]he need for finality forbids a court called up to enforce a final order to 'tunnel back . . . for the purpose of reassessing prior jurisdiction de novo'. . . . If the law were otherwise, and 'courts could evaluate the jurisdiction that they may or may not have had to issue a final judgment, the rules of *res judicata* . . . would be entirely short-circuited.'" *Id.* at 2206, quoting *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1307-08 (5th Cir. 2005).

2. The Courts of Appeals Have Repeatedly Given *Res Judicata* Effect To Final Plan Confirmation Orders, Notwithstanding Legal Error

In *Travelers*, this Court saw the terms of the earlier plan confirmation order as clear and unambiguous and refused to assume any role in reinterpret-

ing the order. "Numerous Courts of Appeals have held that a bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference." *Travelers,* 129 S. Ct. at 2204 n.4. The appellate courts have consistently applied the doctrine of *res judicata* to bankruptcy plan confirmation orders in both chapter 13 and chapter 11 cases.[2] The finality provisions applicable to chapter 11 and chapter 13 bankruptcy plans are essentially the same. *See* 11 U.S.C. §§1141(a), 1144.

The law is firmly established that legal error in the prior proceeding does not alter the *res judicata* effect of a final order. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 714 (1982); C. Wright, A. Miller and E. Cooper, 18 *Federal Practice and Procedure Juris. 2d* § 4403 n.15 (collecting cases). Bankruptcy treatises are replete with citations to cases in which courts refused to set aside terms of confirmed reorganization plans despite claims of fundamental legal error in approving the plans. 8

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[2] *See e.g. In re Jones*, 530 F.3d 1284, 1291 (10th Cir. 2008) (chapter 13); *In re Harvey*, 213 F.3d 318, 322 (7th Cir. 2000) (chapter 13); *Corbett v. MacDonald Moving Services, Inc.*, 124 F.3d 82, 91 (2d Cir. 1997) (chapter 11); *In re Ivory*, 70 F.3d 73 (9th Cir. 1995) (chapter 13); *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267 (10th Cir. 1988) (chapter 11); *In re Chattanooga Wholesale Antiques Inc.*, 930 F.2d 458, 463 (6th Cir. 1991) (chapter 11); *In re Szostek*, 886 F.2d 1405, 1414 (3d Cir. 1989) (chapter 13); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987) (chapter 11). *See also In re Fili*, 257 B.R. 370, 373 (B.A.P. 1st Cir. 2001) (chapter 13); *In re Simpson*, 240 B.R. 559, 562 (B.A.P. 8th Cir. 1999) (chapter 13).

Collier on Bankruptcy, supra, ¶ 1327.02[1][b] at 1327-4, 5; 3 Keith M. Lundin, *Chapter 13 Bankruptcy, supra.* ¶ 229.1 pp. 229-7 to 229-15. Cases following this rule include numerous instances in which creditors raised reasonable and sympathetic claims that the bankruptcy courts had confirmed plans that severely impaired their rights, and the orders were blatantly wrong as a matter of law.[3] In addressing these concerns the courts uniformly hold that the need for finality and an orderly administration of the bankruptcy system must take priority over remedying past defects.

C. Reorganization Bankruptcies Are Collaborative Proceedings In Which All Parties Rely Upon The Finality Of A Plan Approved By The Court

Mr. Espinosa's bankruptcy case involved only one creditor – USAF. This fact makes the case highly unusual. Typical chapter 13 cases involve dozens, sometimes hundreds of creditors. In a chapter 11 reorganization case a plan confirmation order can have a significant effect on thousands of creditors,

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[3] *See e.g. Ruhl v. HSBC Mortgage Services, Inc.*, 399 B.R. 49, 58 (E.D. Wis. 2008) (debtor may not correct overpayment of interest in mortgage claim provided for in confirmed plan); *In re Thaxton*, 335 B.R. 372, 374-75 (Bankr, N.D. Ohio 2005) (mortgagee bound by claim bifurcation provision of plan despite claim of illegality); *In re Sosnowski*, 314 B.R. 23, 26 (Bankr. D. Del. 2004) (mortgagee precluded from challenging plan's designation of its claim as unsecured).

and the fates of the debtor and a myriad of creditors are inextricably intertwined.

In Mr. Espinosa's case, revoking the confirmation order would affect the rights of the debtor and the single creditor. USAF minimizes the effect of the revocation of plan confirmation and the rescission of a fully performed plan when it asserts, "[i]f an order purporting to discharge a nondischargeable debt is void as to that debt, there is no material consequence. The nondischargeable debt simply remains undischarged, leaving other creditors unaffected." USAF Brief p. 42 n.7. It is certainly true that *in this case,* no other creditors would be affected by the confirmation order's revocation.

For the overwhelming majority of reorganization bankruptcies, however, revoking the plan confirmation order would have far reaching consequences. As many decisions note, confirmed plans are analogous to contractual arrangements or consent decrees negotiated among all creditors and a debtor. *In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000). Creditors may freely agree to be treated differently under a plan than strict compliance with the Code might otherwise require. *In re Walker*, 128 B.R. 465, 468 (Bankr. D. Idaho 1991). The plan confirmation process encourages creditors to compromise their rights after taking into account the relative strength of the claims of other creditors.

An increase in money distributed to one creditor always means less money goes to other creditors. If debts can be adjusted or reclassified from unse-

cured to secured, nonpriority to priority, or dischargeable to nondischargeable after confirmation of a plan, shifts in payments will inevitably occur. In chapter 11 cases businesses are bought and sold and millions of dollars change hands, based on a few sentences in a confirmed plan. For example, in *Travelers* the 1986 plan confirmation order included the challenged term under which the Travelers Indemnity Company paid $80 million in return for the release of liability from thousands of asbestos-related personal injury claims. *Travelers,* 129 S. Ct. at 2219.

In reorganization bankruptcies, creditors consent or object to plans based upon their assessment of the debtor's future income and obligations. For example, in deciding whether to object to the terms of a chapter 13 plan proposing to cure a default on a long term home mortgage obligation, the mortgagee must consider the debtor's ability to pay during the three to five-year plan period as well as for the full repayment period remaining on the note. The mortgagee will certainly take into account the existence of long term nondischargeable debt obligations that may impair the debtor's ability to reinstate the defaulted mortgage and maintain future payments. Similarly, many chapter 13 debtors run small businesses in which they buy and sell assets based on plan terms that have been worked out among a group of creditors. The revival of a discharged debt after plan confirmation can wreak havoc upon the operation of the reorganized business. Even more severe consequences ensue when, years after a plan has been fully performed, a creditor decides to resurrect a debt that all plan participants understood to

have been discharged. In considering the importance of finality, even when a plan was confirmed based on an error of law, the Third Circuit noted:

> [T]he purpose of bankruptcy law and the provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute; that if courts should relax provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated; that creditors would not participate in reorganization if they could not feel that the plan was final, and that it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

In re Szostek, 886 F.2d 1405, 1409 (3d Cir. 1989) (quoting *In re Penn Central Transportation Co.*, 771 F.2d 762, 767 (3d Cir.1985)). The *Szostek* court appropriately described the interdependence of interests of all creditors and debtors in a reorganization bankruptcy. Arguing for a contrary view, USAF would focus this Court's attention on what it refers to in its Brief as the "no material consequences" to other creditors that would flow from the revocation of confirmation in the rare bankruptcy case involving only one creditor.

D. The Student Loan Guaranty Agencies' Practice Of Not Reading Chapter 13 Plans Does Not Merit Special Protections

USAF warns that affirming the Ninth Circuit's ruling will require guaranty agencies to hire "an armada of lawyers" to read student loan debtors' chapter 13 plans. USAF Brief at p. 48. The agencies would be "forced to hire the lawyers and expend the resources to scrutinize every such plan." *Id.* at 50. In a similar vein, the National Council of Higher Education Loan Programs ("National Council") predicts in its Amicus Brief that leaving the Ninth Circuit's ruling intact "would force guaranty agencies to hire additional staff to scrutinize every chapter 13 plan for language which has no foundation under the Bankruptcy Code." National Council Brief at *3.

The clear implication of the guaranty agencies' characterization of their current practices is that they do not review chapter 13 plans. They do not check to see whether plans contain "illegal language" which "has no foundation under the Bankruptcy Code." National Council Brief at *3. This being the case, they are obviously not reviewing plans to see whether they comply with section 1325 and other key provisions of the Bankruptcy Code. USAF, quoting from the decision in *In re Ruehle*, 412 F.3d 679, 684 (6th Cir. 2005), apparently deems notice of adversary proceedings to be worthy of attention by guaranty agencies, but notice of the terms of the plans to be merely the "deafening legal background noise" that the agencies can decide to tune out.

USAF Brief. pp. 39-40. This characterization of chapter 13 plans is a view that the guaranty agencies now ask this Court to endorse.

The view that chapter 13 plans are not legal documents they are required to "notice" is at the heart of the guaranty agencies' arguments in this appeal. The National Council, speaking on behalf of all the student loan guaranty agencies, speaks approvingly of USAF's handling of Mr. Espinosa's bankruptcy case, "In response to the notice of Espinosa's chapter 13 plan, USA Funds did the only thing it was required to do: it filed a proof of claim." National Council Amicus Brief * 32. This encapsulates the guaranty agencies' view of the appropriate response to the filing of a chapter 13 case. Other than file a proof of claim, the agencies should do nothing. Despite the fact that the Code permits a debtor's plan to affect the rights of the holder of a nondischargeable debt, the guaranty agencies argue otherwise: "Nothing in the Bankruptcy Code or Rules can be fairly read to impose a duty to read a chapter 13 plan on a creditor holding a nondischargeable claim." National Council Amicus Brief at *33. This position is flatly wrong. The Code places the important duty of protecting their own interests upon *all* creditors. 11 U.S.C. §§ 1322, 1325, 1327, 1330.

E. The Ninth Circuit's Ruling Is Consistent With Student Loan Guaranty Agencies' Regulatory Obligation To Review Chapter 13 Plans And Object When Appropriate

Petitioner USAF is a guaranty agency that administers the collection of federally guaranteed student loans pursuant to regulations promulgated by the U.S. Department of Education ("DOE"). *See e.g.* 34 C.F.R. § 682.200, *et seq.* (FFEL loan regulations); 34 C.F.R. § 674.33, *et seq.* (Perkins loan regulations).

The guaranty agencies' practices, as they describe them in their briefs, are in stark contrast with their obligations set out in DOE regulations. For example, USAF is the largest guaranty agency under the Federal Family Education Loan ("FFEL") program. USAF Brief. pp. 2-3. DOE regulations applicable to FFEL loans require that guaranty agencies participate actively in bankruptcy cases. According to the regulations, in chapter 13 cases the guaranty agency:

> . . . shall determine, based on a review of its own records and documents filed by the debtor in the bankruptcy proceeding -
>
> (A) What part of the loan obligation will be discharged under the plan as proposed;

> (B) Whether the plan itself or the classification of the loan under the plan meets the requirements of 11 U.S.C. § 1129, 1225, or 1325; and
>
> (C) Whether grounds exist under 11 U.S.C. § 1112, 1208, or 1307, as applicable, to move for conversion or dismissal of the case.

34 C.F.R. § 682.402(i)(2)(ii)

Unlike the guaranty agencies' stated practices, the federal regulations *require* that they review all plans filed by chapter 13 debtors and determine whether the plans comply with the provisions of the Bankruptcy Code. This obligation includes reviewing plans for compliance with Code section 1325.

The federal regulations go on to describe actions a guaranty agency may take based upon its review of a chapter 13 plan. Notably, the agency "shall, as appropriate, object to the plan or move to dismiss the case." 34 C.F.R. § 682.402(i)(2)(iii). The regulations define circumstances in which objections are appropriate. These include when:

> (A) The costs of litigation are not reasonably expected to exceed one-third of the amount of the loan to be discharged under the plan; and
>
> (B) With respect to an objection under 11 U.S.C. § 1325, the additional

> amount that may be recovered under the plan if an objection is successful can reasonably be expected to equal or exceed the cost of litigating the objections

34 C.F.R. § 682.402(i)(2)(iii).

In his plan Mr. Espinosa proposed to pay $13,250 toward a debt USAF claimed was $17,832. The disparity between the proposed plan payment amount and USAF's claim was $4,582, less than one-third of the total debt. In such cases the DOE regulation requires that the guaranty agency decide whether the likely litigation costs will exceed the amount to be discharged. Under any objective standard, and certainly under the express guidance of the DOE regulation, allowing Mr. Espinosa's plan to be confirmed would be a reasonable action for a guaranty agency to take.

F. USAF's Arguments Ignore The Role Of Other Federal Options For Discharge And Restructuring Of Student Loan Debt

USAF states that because guaranty agencies have such powerful debt collection tools at their disposal "[t]here is no reason for a creditor to go along with a plan that proposes only partial payment of a student loan debt and discharge of the balance[.]" USAF Brief p. 35. To the contrary, the statutes and regulations for the direct and guaranteed student loan programs authorize discharge of student loan

debts on a number of grounds independent of the "undue hardship" test of Bankruptcy Code § 523(a)(8). The DOE has authority to approve discharge and forgiveness of student loan debt based upon the debtor's disability,[4] school closure[5], improperly certified schools[6] and unpaid tuition refunds.[7] Recent legislation authorizes a presumptive discharge for disabled veterans[8] and forgiveness of student loan indebtedness in return for public service work.[9] When a debtor likely qualifies for one of these discharges, it makes no sense for the creditor to demand a lawsuit to have a bankruptcy court apply the "undue hardship" standard under § 523(a)(8).[10]

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[4] 20 U.S.C. § 1087(a); 34 C.F.R. § 674.61 (Perkins loans), § 682.402(c) (FFEL), § 685.213 (Direct Loan).

[5] 20 U.S.C. §1087(c); 34 C.F.R. § 682.402(d) (FFEL); 34 C.F.R. § 685.214 (Direct); 34 C.F.R. § 674.33(g) (Perkins).

[6] 20 U.S.C. § 1087(c); 34 C.F.R. § 682.402(e) (FFEL); 34 C.F.R. § 685.215 (Direct).

[7] 20 U.S.C. §1087(c); 34 C.F.R. § 682.402(l) (FFEL); 34 C.F.R. § 685.216 (Direct).

[8] The Higher Education Opportunity Act of 2008 (H.R. 4137).

[9] The College Cost Reduction and Access Act of 2007 Pub. L. No. 110-84, 121 Stat. 784.

[10] USAF's Brief states that "guaranteed student loan discharge will cost taxpayers more than $1.5 billion during fiscal 2009." USAF Brief pp. 19-20. In its context, this statement is misleading. The figure in the DOE Budget Report includes nonbankruptcy discharges. http://www.whitehouse.gov/omb/budget/fy2010/assets/edu.pdf. (DOE Budget Report at p. 386).

For low income borrowers in the Direct Loan Program, the regulations provide a number of options involving little or no payment for extended periods of time. Under the Income Contingent Repayment Plan ("ICRP") program that is applicable to many federally guaranteed student loans, the borrower pays a reduced amount, or nothing at all, for up to 25 years, based on a formula for determining affordable payments. 20 U.S.C. § 1078(e); 34 C.F.R. § 685.209(c). At the end of 25 years, even though in some cases no further payments have been made, the loan is discharged. The bankruptcy courts often balance the effect of these ICRP plans against the merits of an undue hardship bankruptcy discharge. *In re Barrett*, 487 F.3d 353, 363-64 (6th Cir. 2007); *In re Ford*, 269 B.R. 673, 677 (B.A.P. 8th Cir. 2001). In the case of a low income or older debtor who proposes to make some payments under a five-year chapter 13 plan with the remaining obligation to be discharged, such a proposal may be more favorable to the creditor than the alternative of a long term zero payment plan under an ICRP followed by a discharge many years later. *See e.g. In re Durrani*, 311 B.R. 496, 506 (Bankr. N.D. Ill. 2004), *aff'd* 320 B.R. 357 (N.D. Ill. 2005) (contrasting $0.00 payment plan under ICRP and bankruptcy discharge).

In many cases the filing of an adversary proceeding should be unnecessary *See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am Bankr. L.J. 179, 184 (Winter 2009) (finding that 57% of undue hardship adversary proceedings litigated in one federal district resulted in allowance of some

discharge, with the average discharge writing off 72% of the student's total loan debt). Through his confirmed plan Mr. Espinosa discharged about 25% of his student loan indebtedness. He paid the other 75% under his plan. The benefits to USAF from litigating a full scale dischargeability adversary action instead of consenting to a plan like his seem tenuous at best. An adversary proceeding delays the disbursements of the debtor's payments to all creditors for many months, possibly for years. 11 U.S.C. § 1326(a)(2) (trustee may not distribute payments to creditors until the court has confirmed a plan). A procedure that resolves student loan disputes with a minimum of litigation benefits all creditors, debtors, and the courts.

G. Informed, Active Participation In Chapter 13 Cases Benefits Creditors, The Courts, And All Parties.

This Amicus is convinced that a ruling that encourages creditors to read chapter 13 plans will be a good thing, not the nightmare that the guaranty agencies foresee. A chapter 13 filing can produce significant benefits for creditors who participate actively and prudently in the proceedings. Because chapter 13 cases involve individuals with regular income who come voluntarily into a court offering to pay money to creditors under close judicial scrutiny, most creditors want to participate in this process. They review the terms of chapter 13 plans and schedules to see how their debts are treated in relation to those of other creditors.

There are several ways in which a chapter 13 plan can be structured to work for the benefit of student loan creditors. Chapter 13 plans can promote prompt repayment of the debt rather than delays that lead to accrual of more interest and penalties that only make full repayment less likely. Many courts allow student loan debts to be classified as a separate claim and paid at a significantly higher rate than other unsecured debts. *In re Webb,* 370 B.R. 418 (Bankr. N.D. Ga. 2007) (approving plan paying 1% of indebtedness to general unsecured creditors and full payments to student loan creditor); *In re Pora*, 353 B.R. 247 (Bankr. N.D. Cal. 2006) (discussing claim classification issues related to student loan debt); 8 *Collier on Bankruptcy* ¶ 1322.05[2][a]. Other courts allow chapter 13 debtors to cure a default in student loan payments under 11 U.S.C. § 1322(b)(5), again favoring the student loan creditor with a level of payment much higher than what other creditors receive. *In re Machado*, 378 B.R. 14 (Bankr. D. Mass. 2007). This option promotes full compliance with the original note obligation. Plans paying substantial student loan debt out of otherwise exempt income have been approved by the courts. *In re Orawsky*, 387 B.R. 128 (Bankr. E.D. Pa. 2008). Rather than ignoring what chapter 13 plans say, student loan creditors should be actively encouraging these types of debt repayment plans.

The guaranty agencies also need to look at how other debts are classified in a plan. For example, any form of misclassification or overpayment of a secured or priority debt can be corrected to produce

more disposable income available to pay the student loan debt. In certain cases a review of the plan may show that the best outcome for a guaranty agency may be to ask that the case be dismissed or converted to another chapter.

H. There Is No Statutory Basis For Special Treatment Of Large Creditors, And There Are Sound Policy Reasons For Rejecting Such An Exception

The guaranty agencies contend that they merit special treatment due to the size of their operations. A few courts have accepted these arguments and essentially found that guaranty agencies are entitled to special constitutional protections. *See In re Ruehle, supra,* 412 F.3d at 684 (noting that guaranty agencies receive "tidal waves of mail" and may have trouble deciding which notices from the bankruptcy courts are important). The deference that some courts have shown to student loan guaranty agencies stands in sharp contrast to the courts' rejection of similar arguments made by other large institutional creditors, including those collecting nondischargeable debts. For example, the courts have emphasized that, unless the Bankruptcy Code expressly provides otherwise, all Code provisions apply to the Internal Revenue Service in the same way they do to all other creditors. *In re Chateauguay*, 94 F 3d 772, 780-81 (2d Cir. 1996) (citing *U. S. v. Whiting Pools*, 462 U.S. 198, 209 (1983)); *In re Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539, 1556 (11th Cir. 1996). Many

bankruptcy courts have echoed the refrain that the "size and complexity" of the Internal Revenue Service does not excuse it from complying with the automatic stay upon notice of a bankruptcy filing, just as other creditors must do.[11] The same is true for other large government bureaucracies. *In re University Medical Center*, 973 F.2d 1065, 1076-77 (3d Cir. 1992) (HHS and Medicare program).

Large private corporations do not fare any better when they point to the quantity of bankruptcy-related data they must review. Bankruptcy courts routinely reject claims of major nongovernmental creditors that bankruptcy paperwork overwhelms their offices. *See In re Crawford*, 388 B.R. 506, 520 (Bankr. S.D. N.Y. 2008) (organizational structure of mortgage lender HSBC not relevant to obligations under Code); *In re Perviz*, 302 B.R. 357, 367 (Bankr. N.D. Ohio 2003) (size and complexity of Ocwen's mortgage servicing activities not a factor in assessing compliance with Code obligations); *In re Vazquez*, 221 B.R. 222, 228 (Bankr. N.D Ill. 1998 ("Sears' size and the complexity of its corporate structure does not excuse its disregard of the discharge injunction or the reaffirmation process in a matter to which it was a party, any more than the size or complexity of the Internal Revenue Service excused its violation of the automatic stay"); *In re*

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[11] *In re Solis*, 137 B.R. 121, 133 (Bankr. S. D.N.Y. 1992); *In re Price*, 103 B.R. 989, 993 (Bankr. N.D. Ill. 1989); *In re Santa Rosa Truck Stop, Inc.*, 74 B.R. 641, 643 (Bankr. N.D. Fla. 1987). *In re Stucka*, 77 B.R. 777, 783 (Bankr. C.D. Cal. 1987).

Withrow, 93 B.R. 436, 439 (Bankr. W.D. N.C. 1988) (same, as to Citibank's credit card collection work).

II. THE *WHELTON* AND *MERSMANN* COURTS MISINTERPRETED SEVERAL CODE PROVISIONS TO CREATE UNAUTHORIZED EXCEPTIONS TO § 1327 AND § 1330 AND TO THE *RES JUDICATA* DOCTRINE

Relying solely on statutory grounds, two courts of appeals have held that courts may revoke final orders that confirmed chapter 13 plans providing for the discharge of student loan debts. *Mersmann v. USAF Funds, Inc., (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007); *Whelton v. Educational Credit Management Corp. (In re Whelton)*, 432 F.3d 150 (2d Cir. 2005). Because of the similarities in the reasoning of the *Mersmann* and *Whelton* decisions, the errors in both can be addressed together.

1. Inaccurate reading of the Hood decision. Focusing upon language found in *Tennessee Student Assistance Corp v. Hood*, 541 U.S. 440 (2004), the *Mersmann* Court held that a ruling in an adversary action was necessary to overcome the "presumptively nondischargeable" and "self-executing" nature of the discharge exception for student loans. *Mersmann*, 505 F.3d at 1047-48 (quoting *Hood*, 541 U.S. at 450). This reading goes far beyond anything the *Hood* decision said. The Ninth Circuit's ruling in *Espinosa*, on the other hand, is consistent with *Hood's* reference to student loan debts as "pre-

sumptively nondischargeable." It is consistent with treatment of the student loan discharge exception as "self-executing." The Ninth Circuit did not do away with adversary proceedings in which debtors can be required to establish the elements of undue hardship under § 523(a)(8). It did not alter the burden of proof in a dischargeability adversary proceeding. The ruling merely acknowledged that student loan creditors can waive the adversary proceeding if they do not object to plan terms that propose to discharge the student loan debt without the adversary proceeding.

In Mr. Espinosa's case the status quo of nondischargeability was not altered by unilateral action of the debtor who "declared" his debt discharged. The status quo changed when the court issued an order changing it. In *Hood* this Court expressly noted that the filing of an adversary proceeding was not a necessary prerequisite to suspension of the "self-executing" nature of the student loan discharge exception. *Id* at 454.

The Ninth Circuit's ruling is also consistent with *Hood's* indication that student loan creditors are "entitled to greater procedural protections" than creditors whose debts are automatically discharged. *Id.* at 451. In the chapter 13 plan confirmation process, notice, a hearing, and the requirement for a court order approving the discharge of the student loan debt are "greater procedural protections" than creditors with presumptively dischargeable debts receive.

2. Section 1328(a)(2) does not trump § 523(a)(8). The *Mersmann* and *Whelton* courts saw a conflict between the language of § 1327(a), which mandates finality to plan confirmation orders, and language in § 1328(a)(2), which states that student loan debts are excepted from the discharge in chapter 13 cases. *See Mersmann* at 1048. The two courts resolved this conflict by reading § 1328(a)(2) to take precedence over § 1327(a) and to preclude discharge of the student loans. Contrary to this interpretation, the statutes can and must be read consistently. Section 1328(a)(2) of the Bankruptcy Code lists the types of debts that are generally excepted from discharge in a chapter 13 case. Section 1328(a)(2) does not override the language of section 523(a)(8). By its plain language, section 523(a)(8) *does* allow the discharge of student loan debts in some cases. There is nothing "illegal" about a bankruptcy court entering an order discharging a student loan debt.

Student loan debts are unique among those listed as exceptions to discharge in the various subsections of section 523(a). Other debts, such as debts for child support, for criminal fines and restitution, for certain taxes, and for drunk driving liabilities are always nondischargeable. The bankruptcy courts do not have discretion to discharge them. 11 U.S.C. § 523(a)(1), (5),(7),(9),(13). Debts incurred through fraud, willful and malicious injury to persons, and fraud and defalcation while acting in a fiduciary capacity are always *dischargeable* "unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge" 11 U.S.C. § 523(a)(c)

(1) (referring to the categories of debts described in subsections (2), (4), and (6) of section 523(a)).[12] If, through an appropriate proceeding in the bankruptcy court, a debt is found to have been incurred through fraud, willful and malicious injury or breach of fiduciary duty, then that debt is not dischargeable. Again, if the debt meets the statutory definition, a court does not have discretion to discharge it.

Unlike the exceptions to discharge described above, under section 523(a)(8) a bankruptcy court has discretion to *allow* the discharge of student loan debt. Bankruptcy courts may determine on a case by case basis whether such a discharge should be granted. *ECMC v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004) (courts exercise discretion in applying *Brunner* "undue hardship" standard under § 523(a)(8)); *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003) (court may exercise "inherent discretion" under "totality of circumstances" test for student loan dischargeability under § 523(a)(8)). *See also Nash v. Connecticut Student Loan Foundation*, 330 B.R. 323, 326 (D. Mass. 2005); *In re Durrani*, *supra*, 311 B.R. at 501; 4 *Collier on Bankruptcy*, *supra*, ¶ 523.14[2].

Because bankruptcy courts have inherent authority under § 523(a)(8) to order discharge of student loan debts, the general language of § 1328(a)(2) cannot be construed in such a way that it effectively revokes that authority. The *Mersmann* and *Whelton*

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[12] Section 523(a)(6) does not apply in chapter 13 except when the debtor receives a hardship discharge under section 1328(b).

courts' interpretations of § 1328(a) erroneously do precisely that. In any event, this argument, too, is one that should have been raised as an objection to confirmation under section 1325(a)(1).

3. The plan confirmation process was established to address questions of compliance with § 1325(a) and other provisions of the Code, making plan confirmation orders conclusive on those issues. The *Mersmann* court overturned the finality of two plan confirmation orders because, in its view, the orders did not comply with section 1325(a). *Mersmann,* 505 F.3d at 1048-49. As discussed above, section 1325(a) provides that a bankruptcy court "shall confirm a plan" if it meets certain criteria, including that the plan "complies with the provisions of this chapter and with the other applicable provisions of this title." 11 U.S.C. § 1325(a)(1). In the view of the *Mersmann* court, the debtors' plans did not comply with Bankruptcy Rule 7001(6), which states that proceedings to determine the dischargeability of a debt are "adversary proceedings." Therefore, according to the court, because the plans did not comply with this Rule, the bankruptcy courts should not have confirmed them.

There are many problems with this line of reasoning. First and foremost, noncompliance with the Bankruptcy Code is a ground for objecting to confirmation of a plan. Under the *Mersmann* court's reasoning, *any* assertion of non-compliance with *any* section of the Bankruptcy Code and *any* bankruptcy rule could be the basis for a proceeding to revoke a confirmation order. Such objections could be filed by

any creditor years after plans were fully performed, even though the creditors were aware of the grounds for objection before the court confirmed the plan. If this were deemed permissible, then several other sections of the Bankruptcy Code would rendered meaningless. Section 1327(a) would be meaningless because plans would never be binding on anyone. Section 1329 would be meaningless because creditors would be given standing to modify plans after confirmation for a vastly expanded set of reasons. Finally, section 1330 would be meaningless because, rather than limiting plan revocation actions to the ground of fraud and subject to a 180 day filing deadline, creditors and debtors could raise any statutory ground they wished at any time in the future to revoke a plan confirmation order. The consequences would be the same in chapter 11, where parallel provisions exist.

Adherence to the Code's finality provisions will be eroded if proceedings to revoke plan confirmation orders can simply be given other names and used to do the same thing. Section 1330, read together with F.R. Bankr. P. 9024, bars what USAF labels a Rule 60(b) motion to "void" a judgment. The *Whelton* Court referred briefly to section 1330 and its 180 day time limit for actions to revoke plan confirmation orders. *Whelton*, 432 F.3d at 156 n.2. The Court then rejected the application of section 1330, stating, "This action is not, however, an action to revoke a confirmation order, but rather to declare one of the provisions of a confirmed plan void *ab initio*." The difference between revoking a court order and declaring it "void *ab initio*" is a distinction without a

difference. If twenty different creditors filed untimely actions to declare twenty different provisions of a confirmed plan void, this would presumably not be subject to the limits on an action to revoke confirmation under the *Whelton* court's reasoning. This amounts to judicial repeal of sections 1327 and 1330.

4. The "notice" and "opportunity to fully litigate" elements of res judicata were satisfied. In *Whelton* and *Mersmann*, as well as in the instant case, the student loan creditors had notice of the proposed plan terms and were aware of the procedures they needed to follow to object. There were no allegations that the debtors and the courts did not follow the appropriate procedures under the Code and rules for serving plans and conducting hearings on plan confirmation. As discussed in more detail below in addressing the due process claim, the creditors' arguments based on inadequate notice are meritless, and rely heavily on their professed business practices of not reading chapter 13 plans.

The *Whelton and Mersmann* courts ignored the basic element of *res judicata* which gives finality to proceedings in which the parties *could have* litigated the issue in question. USAF does not deny that it could have raised the absence of an adversary proceeding as an objection to confirmation of Mr. Espinosa's plan. Had the objection been timely raised, the court considering confirmation would have fully and fairly considered this question. USAF could have appealed a decision it did not like. This is all that is required to satisfy the requirements for *res*

judicata. Travelers Indemnity Co. v. Bailey, 129 S.Ct. at 2205 .

III. USAF'S DUE PROCESS ARGUMENT ELEVATES A BAD BUSINESS PRACTICE TO THE LEVEL OF A CONSTITUTIONAL RIGHT

USAF does not dispute that it received a complete copy of Mr. Espinosa's chapter 13 plan several months before the deadline to file objections to plan confirmation. The plan fully and accurately described how USAF's debt would be treated unless USAF objected. This more than complied with the requirements for notice of a plan filing under F.R. Bankr. P. 2002(b). Notice did in fact "come to the lender's door" as USAF contends due process requires. USAF Brief. P. 39. USAF admits that it time-stamped the document and logged it in at its litigation office. USAF's due process contention boils down to the assertion that it receives "tidal waves of mail" and cannot reasonably be expected to read all the notices it receives from the bankruptcy court. *Id.*

Under their stated practice, the guaranty agencies routinely ignore most notices from the bankruptcy courts. This ensures that they do not see bankruptcy plans. When they are harmed by the content of a plan, they claim that they have been deceived. Consistent with this view, whatever bankruptcy procedures allowed such a plan to be confirmed must be defective, and the debtors and their attorneys who used these procedures must be engag-

ing in a deceptive practice. Circular reasoning plays a big role in the agencies' due process argument, as does the liberal use of metaphors. The creditors find themselves besieged by a "cornucopia" of plans, "tidal waves of mail" and "deafening legal background noise." They are subject to "ambush" by debtors.

Putting aside the metaphors, there is simply no legal support for the guaranty agencies' due process argument. They refer repeatedly to two Supreme Court decisions, *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950) and *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953). Both cases held that notice by newspaper advertisement did not meet due process standards when sending notice by first class mail to the affected party was an alternative. *City of New York* involved a governmental creditor to which constitutional due process protections did not apply. *U.S. v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1090 (6th Cir. 1990) ("*City of New York* was not decided upon due process grounds.")[13] The *Mullane* court specifically found that regular mail addressed to a record address was a form of notice that reasonably prudent individuals would rely upon to transmit important information. 339 U.S. at 319-20. The *Mullane* court had no need to consider the due process "rights" of those who hold the notices in their hands and choose not to read them.

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[13] Many defaulted student loans are held by the U.S Department of Education and state and local government entities. These entities cannot claim due process protections.

The guaranty agencies' engage in conjecture about the delays and perils of mail service. *See e.g.* National Council Brief * 18-19. This discussion is largely irrelevant to contemporary bankruptcy practice. Electronic filing and electronic access to all documents filed in bankruptcy courts are the norm in nearly every jurisdiction in the country. Debtors do not pick the addresses to which bankruptcy court clerks mail notices of their plans. Large institutional creditors such as the guaranty agencies give addresses to a Bankruptcy Noticing Center. [14] These addresses supersede those provided by debtors on their own schedules. Through electronic filing systems creditors receive instantaneous notice of filings of all documents. Creditors can access the complete text of all filed documents, including chapter 13 plans, on line through the courts' PACER system the moment they are filed. A creditor can review a chapter 13 plan instantly upon its filing and respond electronically with a timely objection.

There can be no serious question that the bankruptcy court acted within its authority when it confirmed Mr. Espinosa's plan. USAF had filed a claim in Mr. Espinosa's bankruptcy case. In doing so USAF submitted to the jurisdiction of the bankruptcy court with respect to the subject matter of its claim. *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990); *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 58-59 n. 14 (1989); *Ketchum v. Landy*, 382 U.S. 323, 329 (1966). The bankruptcy court had the authority to

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[14] www.ebnuscourts.com/documents/edi.adp

declare the student loan debt dischargeable. The procedures applicable to both adversary proceedings and plan confirmation proceedings provide ample notice and an opportunity to be heard. Because USAF had actual notice of the proceedings and an opportunity to be heard, any error in the form of proceeding was harmless and waivable. *In re Cannonsburg Environmental Assoc. Ltd.*, 72 F.3d 1260, 1264 (6th Cir. 1996); *In re Copper King Inn, Inc.*, 918 F.2d 1404, 1407 (9th Cir. 1990)(contrasting the time frames for responding to an adversary proceeding and for objecting to a plan, noting that "[t]he difference between twenty-five and thirty days notice is trivial."); *In re Valente*, 360 F.3d 256, 265 (1st Cir. 2004) (failure to proceed as adversary proceeding was harmless error under F.R. Bankr. P. 9005 and Fed. R. Civ. P. 61); *See also In re Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990) (debtor waived Rule 7001's applicability to creditor's proceeding to vacate plan confirmation brought as motion rather than as adversary proceeding required by Rule 7001(5)).

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC., IN SUPPORT OF PETITIONER, UNITED STUDENT AID FUNDS, INC.

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The National Council of Higher Education Loan Programs, Inc. ("NCHELP") respectfully files this brief in support of Petitioner, United Student Aid Funds, Inc.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

NCHELP is the largest student loan trade association, representing a nationwide network of guaranty agencies, secondary markets, lenders, loan servicers, collectors, schools and other organizations that provide financial assistance to millions of American students and their families each year through the Federal Family Education Loan Program (the "FFELP"). The FFELP is a guaranteed student loan program that has helped over 60 million students obtain a post-secondary education since its establishment by Congress as part of the Higher Education Act of 1965 (codified at 20 U.S.C. §1071 *et seq.*). As described in the President's fiscal year

[1] Pursuant to Sup. Ct. R. 37.6, NCHELP states that no counsel for a party authored this brief in whole or in part, and no person other than NCHELP has made a monetary contribution to the preparation or submission of this brief (recognizing that NCHELP is a trade association and its activities are funded by membership dues and assessments). All parties have consented to the filing of this brief by NCHELP, and their consent letters are on file with the Clerk's Office. Counsel of record for all parties received notice at least ten (10) days prior to the due date of NCHELP's intention to file this brief.

2010 budget, the outstanding balance of FFELP guaranteed student loans was $413 Billion as of September 30, 2008. Administering the FFELP is a complex endeavor, which is the subject of detailed regulations promulgated by the United States Department of Education (the "Department").

By regulation, the Department tasks FFELP lenders and guaranty agencies with responsibility for taking specific actions after a bankruptcy case is commenced by a student loan debtor. These applicable regulations are found at 34 C.F.R. §682.402. When a FFELP borrower simultaneously files a chapter 13[2] bankruptcy petition and plan without contemporaneously filing an adversary proceeding seeking a determination of undue hardship, the lender is required to file a bankruptcy claim with the guaranty agency within 30 days of the date it receives notice of the first meeting of creditors. 34 C.F.R. §682.402(g)(2). The guaranty agency then is required to participate in the bankruptcy case, as detailed in 34 C.F.R. §682.402(i).

Because the FFELP operates nationwide, lenders receive bankruptcy notices from all 94 judicial districts in the United States. When lenders file bankruptcy claims with guaranty agencies, the guaranty agencies then are confronted with a huge logistical problem: there is no national form of

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[2] Chapter 13 of the United States Bankruptcy Code, 11 U.S.C. §1301 *et seq.* (the "Bankruptcy Code" or "Code").

chapter 13 plan. As guaranty agencies receive at least 94 different forms of chapter 13 plan, the Ninth Circuit's holding will lead zealous debtors' counsel to seek to gain an unfair advantage by burying improper "discharge by declaration" language in chapter 13 plans. The Ninth Circuit's endorsement of discharge by declaration would force guaranty agencies to hire additional staff to scrutinize every chapter 13 plan for language which has no foundation under the Bankruptcy Code. Given the extraordinarily short deadline for lodging objections to confirmation in chapter 13 cases, a certain number of chapter 13 plans with illegal language are bound to escape detection.

In fact, given the current statutory time frame for the plan confirmation hearing (Code §1324(b)), the deadline for objections to plan confirmation may expire before the guaranty agency can process the lender's bankruptcy claim. *See In re Foster,* Case No. 09-30603 (Bankr. S.D. W.Va. 2009). (Chapter 13 petition and plan both filed on Friday, August 7, 2009; notice of creditors meeting issued on August 10, 2009, establishing September 14, 2009 deadline for objections to confirmation.)[3] If the chapter 13 plan in such a case includes "discharge by declaration" language, the result ordained by the Ninth Circuit literally imposes an impossible burden on NCHELP's member

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[3] These dates appear on the court's electronic docket, accessible through the ECF system.

guaranty agencies (allowing time for delivery by standard mail and 30 days for the lender to file its bankruptcy claim).

Due to the intractable practical implications of the Ninth Circuit's endorsement of "discharge by declaration", NCHELP requests this Court to consider this *Amicus* brief on behalf of its constituent guaranty agencies.

STATEMENT OF THE CASE

Effective November 5, 1990, 11 U.S.C. §1328(a) was amended by the Student Loan Default Prevention Initiative Act of 1990 (Pub. L. No. 101-508, §3007 (1990)) to make student loan debts described in 11 U.S.C. §523(a)(8) nondischargeable in chapter 13 cases. Less than two months later, Doreen Andersen commenced the age of "discharge by declaration" in chapter 13 practice. On December 27, 1990, Ms. Anderson filed her chapter 13 petition and plan containing the following provisions:

> All timely filed and allowed unsecured claims, including the claims of Higher Education Assistance Foundation . . . which are government guaranteed education loans, shall be paid ten percent (10%) of each claim, and the balance of each claim shall be discharged. Pursuant to 11 U.S.C. §523(a)(8), excepting the aforementioned education loans from discharge will impose an undue hardship on the debtor and the debtor's

> dependents. Confirmation of debtor's plan shall constitute a finding to that effect and that said debt is discharged.

The Higher Education Assistance Foundation ("HEAF"), the responsible guaranty agency, filed an untimely objection to the plan, which was denied for that reason. *Andersen v. UNIPAC-NEBHELP*, 179 F.3d 1253, 1254 (10th Cir. 1999), overruled by *Educational Credit Management Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007).

On December 7, 1992 (while Doreen Andersen was still performing her chapter 13 plan), Francisco Espinosa filed his chapter 13 petition and plan. Mr. Espinosa's bankruptcy schedules listed as his only debt the student loans held by United Student Aid Funds, Inc. ("USA Funds"). Thus, Espinosa's chapter 13 plan was an artifice for a surgical attack on his student loan debt, under cover of a generic pleading.

Espinosa's plan proposed to pay only the principal amount of his student loans, unilaterally declaring that "amounts claimed by [USA Funds] for capitalized interest, penalties, and fees shall not be paid for the reasons that the same are penalties and not provided for in the loan agreement between the debtor and the lender. Any amounts or claims for student loans unpaid by this Plan shall be discharged." Espinosa's plan did not contain any language declaring that repayment of such amounts would constitute undue hardship.

Even though USA Funds' claim was the only debt addressed in the plan, and the plan effected a unilateral resolution of an evidentiary dispute, the caption of Espinosa's plan did not evince his intent to adjudicate a dispute with USA Funds. Instead, the plan merely recited a generic warning statement that the rights of creditors may be impaired. Espinosa did not mail his plan to USA Funds' agent for service of process, but instead to the address maintained by USA Funds to receive loan payments. Thus, Espinosa's plan did not fit the form prescribed for resolution of an evidentiary dispute (an adversary proceeding pursuant to Rule 7003 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rule(s)" or "Rule(s)")) and was not served on an appropriate agent pursuant to Bankruptcy Rule 7004(b)(3).

USA Funds responded to the notice of Espinosa's bankruptcy case by doing the only thing it was required to do by the Bankruptcy Code and Rules: it timely filed a proof of claim.[4] In 1992 (and today) nothing in the Bankruptcy Code or Rules provides a good faith basis for chapter 13 debtors to insert "discharge by declaration" language into their plans. However, Bankruptcy Code §502(a)(1) specifically provides that a timely filed proof of claim is deemed allowed. Espinosa did not file an objection to USA

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[4] As Espinosa had defaulted on his student loans prepetition, his notes were held by USA Funds when the bankruptcy case was commended.

Funds' proof of claim and no order was entered by the bankruptcy court disallowing any portion of such claim.

USA Funds did not file an objection to confirmation of the plan. On May 6, 1993, the bankruptcy court entered a form Order Confirming chapter 13 Plan, containing an incantation that "[t]he Plan has been proposed, and its acceptance procured, in good faith and not by any means, promises or acts forbidden by law." The court made this finding despite the fact that (i) Espinosa's plan provided for the discharge of a portion of his student loans without an adjudication of undue hardship, a concept which has no foundation under the Bankruptcy Code or Rules; (ii) the caption of Espinosa's plan did not evince his intent to adjudicate an evidentiary dispute with USA Funds, despite the fact that its claims were the only debts addressed in his plan; and (iii) Espinosa did not serve his plan on USA Funds' agent for service of process, but instead mailed the plan to its general address for receipt of payments. The bankruptcy court's order did not contain any finding of undue hardship.

After the bankruptcy court Order Confirming chapter 13 Plan had become final and non-appealable under Bankruptcy Rule 8002, on June 10, 1992, the chapter 13 trustee mailed a pleading captioned "Trustee's Notice To Creditor" to USA Funds' address for receipt of payments. The "Trustee's Notice To Creditor" is a fugitive pleading; it has no foundation under the Bankruptcy Code and Rules. *See, e.g.*,

FED. R. BANKR. P. 7003 and 9014. USA Funds did not respond to the "Trustee's Notice To Creditor."

Espinosa performed his plan as proposed and the bankruptcy court entered a form discharge order on May 30, 1997, generally discharging all debts provided for by the plan, specifically excepting student loans from this discharge. Espinosa did not appeal from the entry of that order.

In 2000, collection efforts resumed. On June 23, 2003, Mr. Espinosa filed a motion to reopen his case and, on October 2, 2003, he filed a motion for violation of the discharge injunction, contempt, sanctions and damages. On October 30, 2003, USA Funds filed a response to Espinosa's motion, together with a cross motion for relief from the confirmation order pursuant to Federal Rule of Civil Procedure ("FRCP") 60(b)(4) and Bankruptcy Rule 9024. On August 12, 2004, the bankruptcy court entered an order finding that the discharge injunction had been violated, but denying the Debtor's request for contempt, sanctions and damages. On appeal, the district court reversed, holding that the confirmation order was void for lack of due process due to the absence of an adversary proceeding.

When this case reached the Ninth Circuit, that court first remanded the matter to the bankruptcy court to answer the question whether the original discharge order (which provided that Espinosa's student loan debt had not been discharged) was the result of a clerical error. The bankruptcy court ruled

that a clerical error had occurred and entered an order discharging Mr. Espinosa's student loan obligations. The Ninth Circuit then reversed the district court and remanded the case to the bankruptcy court for reinstatement of the order enforcing the discharge injunction and for a determination whether USA Funds acted willfully in violating the injunction. *Espinosa v. United Student Aid Funds, Inc.* (*In re Espinosa*), 553 F.3d 1193, 1205 (9th Cir. 2008).

SUMMARY OF ARGUMENT

The Bankruptcy Code gives debtors extraordinary powers to reorder contract rights among and between themselves and their creditors, provided that creditors are afforded notice and opportunity for a hearing. Bankruptcy Code §102(1) explains that this phrase means after such notice as is appropriate in the particular circumstances and such opportunity for a hearing as is appropriate in the particular circumstances. This is the Bankruptcy Code's due process mission statement.

The Bankruptcy Code itself never specifies what process is due in any particular circumstance. Instead, in 28 U.S.C. §2075, Congress gave this Court "the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11." In promulgating the Bankruptcy Rules, this Court

broadly distinguished between matters requiring general notice (those affecting general administration of bankruptcy cases and all creditors generally, but none specifically), and matters requiring service of process (those implicating the rights of specific parties). Bankruptcy Rule 2002 articulates the manner of giving general notice and includes the time for filing objections to confirmation of a chapter 13 plan. Bankruptcy Rules 7001 governs notice where the rights of specific parties are in dispute and includes proceedings to determine dischargeability of a debt. Rule 7001 requires the dispute to be properly framed by summons and complaint with service upon an authorized agent.

The exception of student loans from discharge is self-executing. Debtors must affirmatively secure a hardship determination. Thus, the Bankruptcy Code does not provide a good faith basis for "discharge by declaration" language in chapter 13 plans.

Hundreds of thousands of chapter 13 cases are commenced every year. The Bankruptcy Code and Rules implement a true "rocket docket" to cope with this deluge of cases. However, there is no national form of chapter 13 plan. Given the pervasive nature of the FFELP, student loan guaranty agencies receive a cornucopia of forms of chapter 13 plans from the 94 judicial districts in the United States, with an arbitrarily short period of time to respond. In fact, given the nature of chapter 13 practice, the deadline for objections to plan confirmation can actually expire before the guaranty agency receives the chapter 13

plan. Student loan guaranty agencies do not receive notice of "discharge by declaration" plan language in a reasonable form within a reasonable time to actually participate in chapter 13 bankruptcy cases.

The Ninth Circuit's analysis of this issue conflates the concepts of "service" and "notice" under the Bankruptcy Rules. Service connotes a summons and complaint which properly frames the issue, which is served on an authorized agent. Chapter 13 plans with concealed "discharge by declaration" language which are mailed to student loan lockboxes flout this principle.

The Ninth Circuit compounds this error by equating actual notice that a chapter 13 plan has been filed with actual notice that the plan contains improper "discharge by declaration" language. Holders of nondischargeable claims generally have no duty to actually read plans. The most economical way to administer the FFELP is to file a proof of claim, accept whatever distribution is forthcoming under the plan, and resume collection after the case is concluded.

Finally and most critically, the Ninth Circuit errs by failing to recognize that this Court, not Congress, has articulated the ground rules for procedural due process in bankruptcy cases. The practice of discharge by declaration is not a means employed by one who is desirous of actually informing a student loan creditor that the issue of dischargeability has been brought into play. Thus, the practice of including "discharge

by declaration" language in chapter 13 plans operates to deny procedural due process to student loan guaranty agencies.

ARGUMENT

USA Funds' brief thoroughly explains why a bankruptcy court confirmation and discharge order which purports to discharge student loan debt without an adjudication of undue hardship is void for exceeding the power and authority granted by Congress to bankruptcy courts in the Bankruptcy Code. This brief will focus on the reasons why the practice of "discharge by declaration" in chapter 13 plans operates to deny procedural due process to student loan guaranty agencies.

CONGRESS EMPOWERED THIS COURT TO ESTABLISH PROCEDURAL DUE PROCESS IN BANKRUPTCY CASES VIA THE BANKRUPTCY RULES

The phrase "after notice and a hearing" appears throughout the Bankruptcy Code as a preface to powers given to debtors to radically reorder contract rights among and between themselves and their creditors. Bankruptcy Code §102(1) explains that this phrase "means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular

circumstances[.]" Bankruptcy jurisdiction in general is *in rem* and this is true for proceedings to determine the dischargeability of a debt by a bankruptcy court. *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). The rule of construction in Bankruptcy Code §102(1) thus anticipates that due process must be observed in a bankruptcy case before property rights, including dischargeability of claims, may be adjudicated.

The Bankruptcy Code itself never specifies the quantum or manner of giving notice required in any particular context. Instead, Congress empowered this Court, as the ultimate arbiter of what process is due, to specify what manner of notice must be given in each context under the Code. In 28 U.S.C. §2075, this Court is given "the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11."

In promulgating the Bankruptcy Rules, this Court has broadly distinguished between matters requiring general notice (those affecting the general administration of bankruptcy cases and all creditors generally, but none specifically) and matters requiring service of process (those implicating the rights of specific parties). Bankruptcy Rule 2002 articulates the manner of giving general notice. The subjects covered by Rule 2002 include the date fixed for the meeting of creditors, filing proofs of claim, objections to discharge and objections to a chapter 13 plan. Once a bankruptcy case is filed, all creditors are

charged with notice and a duty of inquiry that these events, which occur in every case, will take place on a specified date. *See Lawrence Tractor v. Gregory* (*In re Gregory*), 708 F.2d 1118, 1123 (9th Cir. 1983).

Bankruptcy Rules 7001 and 9014 govern notice where the rights of specific parties are in dispute. These are events that do not automatically occur in every bankruptcy case. Thus, adversary proceedings and contested matters must be initiated by summons and complaint or motion, and served on the affected creditor at the address of its agent for service of process. *See* FED. R. BANKR. P. 7004 and 9014(b). Taken together, the Bankruptcy Code and Rules were designed to satisfy the due process requirement of adequate notice to parties whose interests may be affected in bankruptcy cases. *See In re Boyken*, 246 B.R. 825, 828 (Bankr. E.D. Va. 2000). As explained by the Fourth Circuit:

> Bankruptcy Rule 2002(b) does not require specific notice of [chapter 13] plan provisions affecting a particular creditor, nor does it require the notice to be served in a particular manner or upon any particular person. 'There are many aspects to and actions that may be taken in bankruptcy cases which affect the general administration of the case and all creditors generally, but none specifically.' . . . generally, such matters require 'notice' but not service of process. . . . When the rights of specific parties become an issue, however, service of the initiating

> motion or objection on the affected party is required. . . . FED. R. BANKR. P. 7003, 7004.

Banks v. Sallie Mae Servicing Corp. (In re Banks), 299 F.3d 296, 301 (4th Cir. 2002) (citations omitted). Thus, when the rights of specific parties become an issue, the Bankruptcy Rules require the debtor to both properly frame the dispute (by complaint or motion) and properly serve the pleading on one authorized to accept service of process for the affected creditor. FED. R. BANKR. P. 7001, 7004 and 9014.

With respect to student loans, Bankruptcy Code §523(a)(8) is "self executing." *Hood*, 541 U.S. at 450. Thus, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." *Ibid.* In the Bankruptcy Rules, this Court prescribes that a proceeding to determine the dischargeability of a debt is an adversary proceeding. FED. R. BANKR. P. 7001(6). An adversary proceeding is a civil action commenced by filing a complaint with the bankruptcy court, which is then served, together with a summons, in the manner necessary to effect service of process. FED. R. BANKR. P. 7004. The debtor then must shoulder the burden of proving undue hardship, which is a formidable task.[5]

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[5] In considering whether excepting a student loan from discharge will impose an undue hardship, the majority of courts including those in the Ninth Circuit follow the three-part test first set forth in *Brunner v. New York State Higher Education Services Corp. (In re Brunner)*, 46 B.R. 752 (S.D.N.Y. 1985), aff'd

(Continued on following page)

These are the building blocks of procedural due process.

THE PRACTICE OF "DISCHARGE BY DECLARATION" IN CHAPTER 13 PLANS VIOLATES PROCEDURAL DUE PROCESS BECAUSE STUDENT LOAN GUARANTY AGENCIES ARE DENIED THE OPPORTUNITY TO PARTICIPATE IN BANKRUPTCY CASES

According to the Fiscal Year 2008 Audited Annual Reports of Chapter 13 Standing Trustees, 323,591 chapter 13 cases were commenced in 2008.[6] This translates into an average of more than 3,442 new chapter 13 cases filed in each judicial district. Because of the magnitude of chapter 13 filings, a natural tension exists between the court's need to efficiently administer these cases while making sure that due process is accorded.

When a debtor with student loans simultaneously files a chapter 13 petition and plan, two complex chains of events are set into concurrent motion: (i) the timetable for objections to and confirmation of the plan; and (ii) the regulatory

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831 F.2d 395 (2nd Cir. 1987). *See United Student Aid Funds, Inc. v. Pena* (*In re Pena*), 155 F.3d 1108 (9th Cir. 1998).

[6] This report can be found at http://www.usdoj.gov/ust/eo/private_trustee/library/chapter13/docs/ch13ar08-AARpt.xls.

response by the student loan lender and guaranty agency.

Chapter 13 plans are frequently filed with the petition, and if not, must be filed within 15 days thereafter per Bankruptcy Rule 3015(b). When the chapter 13 plan is filed with the petition, the plan or a summary of the plan (the "Plan Document") is mailed together with Official Form B9I (the "Initial Notice") to creditors at the address furnished by the debtor with the petition. FED. R. BANKR. P. 3015, 1007(a). In the case of a student loan creditor, the debtor will usually furnish the address to which payments are being mailed – generally, a lockbox service maintained for student loans. The Initial Notice contains the date for the confirmation hearing, the bar date for filing proofs of claim and the date for the first meeting of creditors.

Now for the technical part: Rule 2003(a) specifies that the meeting of creditors in a chapter 13 case shall be held no fewer than 20 and no more than 50 days after the petition date. Bankruptcy Code §1324(b) specifies that the hearing on confirmation of the chapter 13 plan may be held not earlier than 20 days and not later than 45 days after the meeting of creditors. Finally, Bankruptcy Rule 2002(b) specifies that the clerk or some other person as the court may direct shall give all creditors not less than 25 days notice by mail of the date fixed for filing objections to and the hearing to consider confirmation of the chapter 13 plan.

Under Department of Education regulations, the bankruptcy filing triggers another sequence of events. A student loan lender is required to file a bankruptcy claim with the applicable guaranty agency within 30 days of the date it receives notice of the first meeting of creditors, which is included in the Initial Notice. 34 C.F.R. §682.402(g)(2). The lender is not charged with the responsibility for filing objections to the plan. 34 C.F.R. §682.402(i)(2). Instead, the guaranty agency is directed to participate in the chapter 13 case and file any necessary objections to the plan. 34 C.F.R. §682.402(i)(2)(iii). However, because Bankruptcy Rule 2002(b) only requires 25 days notice of the time for filing objections to and the hearing to consider confirmation of a chapter 13 plan, frequently the guaranty agency does not have adequate time to actually participate in any given case. This system practically guarantees that, if discharge by declaration becomes the law of the land, a substantial number of chapter 13 plans will evade detection, regardless of the level of diligence exercised by the guaranty agency.

To illustrate, under the Bankruptcy Code and Rules, a debtor having FFELP loans could file a chapter 13 petition and plan on Tuesday, September 1, 2009. The bankruptcy clerk's office would typically issue the Initial Notice the next day. Pursuant to Bankruptcy Rule 2003(a), the meeting of creditors

could be set as early as Friday, September 25, 2009.[7] This notice might also provide for the hearing to consider confirmation of the debtor's plan to be held on Thursday, October 15, 2009, with objections to confirmation due on September 30, 2009. If the debtor in this hypothetical has student loans which are not defaulted, the debtor will list his lender as a creditor, and will probably use the creditor's address for receipt of payments. The bankruptcy clerk in turn will mail the Initial Notice to this address, pursuant to Rule 2002(g)(2).

The debtor's FFELP lender is required to file a bankruptcy claim with the applicable guaranty agency within 30 days of the date it receives the Initial Notice. 34 C.F.R. §682.402(g)(2). If the lender received the Initial Notice on Thursday, September 3, 2009, the lender would have at least until October 2, 2009 to file a bankruptcy claim with the guaranty agency. By that time, the deadline for objecting to confirmation of the plan – September 30 in this hypothetical – has already passed.

Even if the guaranty agency receives the chapter 13 plan from the lender before the deadline for objections to confirmation, the plan follows no required form. There is no national form of chapter 13

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[7] This hypothetical assumes that the clerk adds three days for mailing pursuant to Bankruptcy Rule 9006(f), even though this rule does not apply to notices, *per se*.

plan. As there are 94 judicial districts in the United States and its territories, there are at least 94 forms of chapter 13 plan. If the plan contains "discharge by declaration" language, there are innumerable ways for this language to be buried therein. This follows because neither the Bankruptcy Code nor Rules provide any good faith basis for debtors to include "discharge by declaration" language in the plan.

"Discharge by declaration" in a chapter 13 plan flouts procedural due process at every turn. The plan bears no resemblance whatsoever to a complaint. A complaint very clearly identifies the plaintiff and defendant, and is designed to pinpoint the controversy between those parties. A chapter 13 plan on the other hand is designed to separate creditors by class, and specify the treatment of each class of claims. The treatment of creditors within classes must be the same, and the debtor may not discriminate unfairly against any class so designated. 11 U.S.C. §§1322(a)(3), (b)(1). These are matters which affect all creditors generally, by class, and thus notice is appropriate via Bankruptcy Rule 2002(b). A chapter 13 plan is not designed to procure adjudication of a discrete evidentiary dispute between the debtor and one of his creditors.

If *Espinosa* is affirmed, student loan guaranty agencies will be subject to deluge by a cornucopia of plan forms, each potentially containing "discharge by declaration" language buried in ways limited only by the imagination of zealous debtors' counsel. Guaranty agencies will be forced to hire new staff to scrutinize

a limitless variety of plans within an arbitrarily short period of time. Regardless of their level of diligence, a significant number of improper plans are bound to evade detection.

As this Court noted in *Hood*, "[c]reditors generally are not entitled to personal service before a bankruptcy court may discharge a debt." 541 U.S. at 451. A chapter 13 plan properly describes the conditions by which the debtor proposes to procure a discharge of general unsecured debts pursuant to Bankruptcy Code §1328, a matter which affects all creditors generally, but none specifically. *Banks*, 299 F.3d at 301. When debtors conceal "discharge by declaration" language in chapter 13 plans, with notice limited to that allowed under Bankruptcy Rule 2002(b), the affected guaranty agency is denied its right to specific notice by service of a summons and complaint.

Thus, the chapter 13 practice of "discharge by declaration" operates to deny procedural due process to student loan guaranty agencies. To accord due process,

> [t]he notice must be of such nature as reasonable to convey the required information, . . . and it must afford a reasonable time for those interested to make an appearance. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the

> [guaranty agency] might reasonably adopt to accomplish it.

Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314-15 (1950). The practice of "discharge by declaration" satisfies none of these prerequisites. Most clearly, this practice does not afford student loan guaranty agencies a reasonable time to make their appearance.

To take a real world example, in *Andersen*, the guaranty agency (HEAF) actually filed a belated objection to confirmation, which was denied by the court because it was untimely. In retrospect, this was a glaring sign that the notice procedure in place did not afford the guaranty agency a reasonable time to make its appearance. When the issue arose, the bankruptcy court stated the issue as follows:

> whether a debtor may, by including language in a plan, discharge an otherwise non-dischargeable debt in chapter 13. . . . The real issue is whether the plan provisions here constitute a binding adjudication of hardship.

Andersen v. Higher Education Assistance Foundation (*In re Andersen*), Case No. 96-05277 (Bankr. KS 1997) (Doc. #16 at p. 6). In analyzing this issue, the bankruptcy court rejected Ms. Andersen's argument that *res judicata* operates to bar a determination of dischargeability:

> "a judicial determination of undue hardship requires that the debtor bring an adversary

> proceeding. As the District Court for this district stated: [E]very published decision has uniformly held Section 523(a)(8) to be "self executing." . . . (citations omitted) Debtor had the burden to seek a formal judicial determination of the nondischargeability of her student loans. Language in a plan does not constitute a judicial determination of hardship. HEAF and the other creditors were entitled to a higher level of due process before the confirmation of the plan invokes the concept of res judicata. Congress' clear intent to except student loans from discharge cannot be overcome simply by inserting language into a proposed plan providing a confirmation of the plan constitutes a finding of undue hardship. Because the debtor did not formally seek a determination of dischargeability, the student loan debts are nondischargeable.

Id. at p. 9.

The bankruptcy court's Order in *Andersen* is terse, clear and correct, reflecting a result that appeared to the court to be self-evident. However, on appeal, HEAF did not argue that it lacked adequate notice of Andersen's plan prior to confirmation, leading the Tenth Circuit Bankruptcy Appellate Panel ("BAP") to conclude "that due process has been accorded." *Andersen v. Higher Education Assistance Foundation (In re Andersen)*, 215 B.R. 792, 795 (10th Cir. BAP 1998). The BAP reached this erroneous conclusion by relying on precedent from chapter 11 cases, principally *In re Penrod*, 50 F.3d 459 (7th Cir.

1995). The BAP looked to *Penrod* because Bankruptcy Code §1141 contains language analogous to that found in Bankruptcy Code §1327. Code §1141(a) provides that

> . . . the provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not the claim or interest of such creditor . . . is impaired under the plan and whether or not such creditor . . . has accepted the plan.

Penrod in fact states a well-reasoned analysis of the binding effect of a chapter 11 confirmation order. However, the Tenth Circuit BAP's reliance on *Penrod* and its progeny (215 B.R. at 794) is misplaced in the analysis of chapter 13 "discharge by declaration," because student loan creditors in chapter 13 cases are not accorded time to actually participate.

In *Penrod*, the creditor filed a proof of claim reflecting its lien on the Penrods' hogs. The Penrods did not object to the creditor's claim nor question the validity of its lien. Their plan recognized the creditor's secured claim and provided that it would be paid in full with interest. However, the plan was silent regarding whether the creditor would retain its lien on the Penrods' hogs, post confirmation. After the Penrods' plan was confirmed and went into effect, they sold their hogs for slaughter, without remitting to the creditor proceeds from this sale. The creditor then filed suit in state court, claiming that the Penrods' failure to remit these proceeds violated the security agreement between the parties. The Penrods

responded by asking the court to hold the creditor in contempt for violating the plan confirmation order. 50 F.3d at 461.

The question in *Penrod* was whether the creditor's lien passed through the bankruptcy unaffected. Judge Posner found that it did not, because Bankruptcy Code §1141(c) specifies that "except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors. . . ." *Id.* at 462-63. However, Judge Posner's analysis contains a critical predicate:

> when lien holders participate in a bankruptcy proceeding, and especially in a reorganization, they know that their liens are likely to be affected, and indeed altered. . . .
>
> We have concluded that the default rule for secured creditors who file claims for which provision is made in the plan or reorganization is extinction and is found in the Code itself. Section 1141(c) provides with immaterial exceptions that 'except as provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors. . . . ***This is provided, we emphasize, that the holder of the lien participated in the reorganization. If he did not, his lien would not***

> ***be 'property dealt with by the plan' and so this section would not apply.***

Id. at 462-63 (emphasis added).

There is a critical difference between the typical chapter 11 case and the chapter 13 practice of discharge by declaration. In the typical chapter 11 case, the plan is not filed with the petition. This was certainly true in *Penrod*. The Penrods filed their chapter 11 petition on March 27, 1987.[8] On May 12, 1987, the creditor's predecessor-in-interest (Clinton County Farm Bureau Cooperative) filed its notice of appearance and request for service by its counsel.[9] More than a year later, on May 6, 1988, the Penrods filed their disclosure statement and chapter 11 plan of reorganization. During this interval, the creditor's predecessor-in-interest filed its proof of claim. The bankruptcy court entered an order approving the Penrods' disclosure statement on October 19, 1988, and finally entered an order confirming the Penrods' plan of reorganization on June 21, 1990.

These facts led Judge Posner to conclude that the affected creditor in fact had participated in the Penrods' bankruptcy case. As the secured creditor had filed a notice of appearance and request for service by

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[8] Case No. 87-30501 in the United States Bankruptcy Court for the Northern District of Indiana, of record through the ECF system.

[9] *Id.* at Doc. No. 24 (reflecting the creditor's predecessor-in-interest).

counsel, the Penrods' disclosure statement and plan of reorganization were *served* on its counsel, pursuant to FRCP 5(b) incorporated in Bankruptcy Rule 7005. In the chapter 11 context, where creditors are found to have participated, such creditors will have noted their appearance by counsel, and transmittal of the disclosure statement and plan of reorganization to counsel qualifies as service.

By contrast, student loan guaranty agencies are denied the ability to participate in a chapter 13 case where the debtor proposes a plan containing "discharge by declaration" language. In such a case, the Plan Document is not transmitted in a manner sufficient to qualify as service of process. Moreover, the "rocket docket" endemic to chapter 13 practice simply does not allow sufficient time for a guaranty agency to participate, particularly where "discharge by declaration" language is buried in 94 different forms of chapter 13 Plan Document.

This analysis is completely consistent with this Court's recent decision in *Travelers Indemnity Co. v. Bailey*, 129 S.Ct. 2195 (2009). In *Travelers*, this Court made the following salient observation:

> So long as respondents or those in privity with them were parties to Manville's bankruptcy proceeding, and were given a fair chance to challenge the bankruptcy court's subject-matter jurisdiction, they cannot challenge it now by resisting enforcement of the 1986 orders.

Id. at 2198. In *Travelers*, this Court recognizes the same principal stated by Judge Posner in *Penrod*. Where affected creditors have proper notice of a bankruptcy case and a reasonable time to make their appearance, due process is satisfied. However, where the circumstances demonstrate that an affected creditor has not been accorded proper notice or a reasonable time to make its appearance, then due process is not satisfied. *See American Bank and Trust Company v. Jardine Insurance Services Texas, Inc. (In re Barton Industries, Inc.)*, 104 F.3d 1241, 1245 (10th Cir. 1997).

IN *ESPINOSA* THE NINTH CIRCUIT CONFLATES THE CONCEPTS OF SERVICE AND NOTICE AND IGNORES THE SELF-EXECUTING EXCEPTION OF STUDENT LOANS FROM DISCHARGE

In its analysis, the Ninth Circuit commits the fundamental error of confusing the distinction between service and notice under the Bankruptcy Rules, then manages to lose track of the critical concept that the exception of student loans from discharge is self-executing – all in the same sentence: "when the creditor is ***served*** with notice of the proposed plan, it has a full and fair opportunity to insist on the special procedures ***available*** to student loan creditors by objecting to the plan. . . ." *Espinosa*, 553 F.3d 1193, 1199 (emphasis added).

USA Funds was not served with anything in *Espinosa*. Service implies service of process. Service connotes a summons and complaint or motion which properly frames the evidentiary issue pursuant to Bankruptcy Rule 7003 or 9014(a), which is then served according to Bankruptcy Rule 7004(b)(3) or 9014(b). Here, there was no summons and complaint nor even a motion, and notice was of the garden variety provided in Bankruptcy Rule 2002. The notice received does not qualify as service on USA Funds.

Moreover, the exception of student loan debt from discharge is self-executing. *Hood*, 541 U.S. at 450. The debtor has the burden of securing an undue hardship determination. *Ibid.* To do so, the debtor must file a complaint and serve it on the student loan creditor. These are not "special procedures" which are "available to student loan creditors." Guaranty agencies do not have to opt in and debtors are not allowed to opt out of due process. The Ninth Circuit's suggestion otherwise is impossible to square with *Hood*.

The Ninth Circuit again improperly conflates the concepts of service and notice when it states that:

> the creditor in our case (as in [*Mersmann* and *Whelton*])[10] did get proper notice of the

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[10] *Educational Credit Management Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007); *Whelton v. Educational Credit Management Corp. (In re Whelton)*, 432 F.3d 150 (2d Cir. 2005).

proposed Chapter 13 plan, and so knew perfectly well that if the plan were approved and satisfied, the debtor would be granted a discharge of the student debt listed in the plan. In our case, the creditor was ***served*** with the 'Notice of Commencement of Case Under Chapter 13 of the Bankruptcy Code, Meeting of Creditors and Fixing of Dates.' Attached to this notice was a copy of the proposed Chapter 13 plan which carried the following prominent warning: "WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN." There follows a detailed description of debtor's assets and liabilities, a payment schedule and a great deal of other ***pertinent information***. One section of the plan is entitled "education loan(s)" and lists all of Fund's loans, for a total of $13,250. The plan specifies that this amount should be paid in full, followed by a paragraph stating as follows:

> The amounts claimed by the United Student Loan Aid Funds, Inc., et al. for capitalized interest, penalties and fees shall not be paid for reasons that the same are penalties and not provided for in the loan agreement between the debtor and the lender. The subsequent paragraph provides as follows: 'any amounts or claims for student loans unpaid by this plan shall be discharged.' . . .

Espinosa, 553 F.3d at 1200-201 (emphasis added). Once again, USA Funds did not receive *service* of any pleading. Instead, it received mere notice that a chapter 13 case had been filed along with a plan containing a generic "warning" that if you are a creditor, your rights may be impaired by this plan. Of course, in Espinosa's plan, USA Funds was the *only* creditor, and the improper language effecting a discharge by declaration was buried on page 4.

Moreover, Espinosa's chapter 13 plan did not contain very much "pertinent information" whatsoever. Espinosa's chapter 13 plan is a form document, most of which is completely inapplicable to his bankruptcy case.[11] It is not until page 4 of the plan that the reader uncovers the concealed evidentiary dispute. In reality, Espinosa's entire bankruptcy case was predicated on this provision, which is buried in an improper pleading.

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[11] In fact, Espinosa's chapter 13 plan is a veritable "Pandora's Box" of potential mischief. At Paragraph 4 on Page 2 of the plan, Espinosa purports to nullify liens if specific creditors do not file a proof of claim within seven (7) days of the first scheduled confirmation hearing date. In fact, the notice of commencement of case sets a bar date of April 14, 1993, for filing proofs of claim. This date is one day before the date set for the confirmation hearing. Thus, the plan purports to nullify liens (another dispute governed by Bankruptcy Rule 7001) without proper notice and rewrites the bar date for filing proofs of claim. According to the Ninth Circuit's logic, this apparently is not a problem.

In response to the notice of Espinosa's chapter 13 plan, USA Funds did the only thing it was required to do: it filed a proof of claim. The Bankruptcy Code simply does not allow debtors to declare that their student loans shall be discharged without an adversary proceeding. In fact, Bankruptcy Code §1322(b)(11) forbids "discharge by declaration" of otherwise nondischargeable debts in chapter 13 plans. As the holder of a nondischargeable claim, USA Funds had no duty to even read Espinosa's chapter 13 plan. If there is no duty to read the plan, USA Funds cannot be charged with actual notice of evidentiary disputes buried in the plan.

IN *ESPINOSA* THE NINTH CIRCUIT CONFLATES ACTUAL NOTICE OF THE PLAN WITH ACTUAL NOTICE OF IMPROPER "DISCHARGE BY DECLARATION" LANGUAGE WITHIN THE PLAN

The Ninth Circuit suggests that due process was satisfied in Espinosa's case because USA Funds had actual notice of the "discharge by declaration" in Espinosa's plan:

> Funds here did receive actual notice of his bankruptcy case; we know this both from documents in the record, which show receipt, and the fact that Funds presented a proof of claim. Because 'due process does not require actual notice,' . . . it follows *a fortiori* that actual notice satisfies due process. We find

> the argument that the Constitution requires something *more* than the actual notice strained to the point of the bizarre.

Id. at 1203.

Here, the Ninth Circuit conflates actual notice that a chapter 13 plan had been filed with actual notice that such chapter 13 plan contained improperly concealed language effecting discharge by declaration. Nothing in the Bankruptcy Code or Rules can be fairly read to impose a duty to read a chapter 13 plan on a creditor holding a nondischargeable claim. In fact, a compelling public policy argument suggests that student loan guaranty agencies should not incur costs to review chapter 13 plans. Because student loans are nondischargeable in bankruptcy, the most economical way to administer chapter 13 cases and save taxpayer dollars is to simply file a proof of claim, accept whatever distribution is forthcoming under the debtor's plan, then resume collection after the case concludes. This minimizes the cost of administering the FFELP, maximizes the amount available to be re-loaned under that program and reduces the amount of the government's loss (due to the federal guaranty).

The Ninth Circuit relies on *Lawrence Tractor Co. v. Gregory* (*In re Gregory*), 705 F.2d 1118 (9th Cir. 1983), as support for its flawed analysis. *Gregory* concerned a chapter 13 plan filed by a convicted embezzler on November 8, 1979. At that time, Bankruptcy Code §1328(a) allowed for the discharge

of embezzlement debts. Thus, in the context of *Gregory*, the creditor was no different from any other unsecured creditor whose debt was subject to discharge.

Once a chapter 13 bankruptcy petition is filed, all unsecured creditors are properly charged with knowing all things which occur in every chapter 13 case; for example, that a plan will be filed and there will be a deadline for objections to such plan. Unsecured creditors are also properly charged with knowing what a chapter 13 plan shall provide and what it may provide under Bankruptcy Code §1322. Unsecured creditors are further properly charged with knowing the standards for confirmation of a chapter 13 plan under Bankruptcy Code §1325, including the requirement that the plan be proposed in good faith. 11 U.S.C. §1325(a)(3). These matters occur in every chapter 13 case.

The issue in *Gregory* was whether a convicted embezzler who proposes a chapter 13 plan with zero payment to unsecured creditors is proposing a plan in good faith. The Ninth Circuit was correct in finding that the affected creditor was "under constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril." *Id.* at 1123. Because every chapter 13 plan must be proposed in good faith, all creditors with notice of the plan are properly charged with knowing this. As such, notice pursuant to Rule 2002 of *Gregory's* chapter 13 plan was adequate.

By contrast, Bankruptcy Code §1328(a) specifically excepts student loans from discharge, and the exception is self-executing. Not all chapter 13 debtors request a determination of whether their student loan debts should be discharged on the basis of undue hardship. Thus, there is no reason for a guaranty agency to presume that the dischargeability of student loans will necessarily arise in a chapter 13 case. Therefore, *Gregory* in fact lends no support to *Espinosa*, and the Ninth Circuit's refusal to call for rehearing *en banc* in this case on the basis that it would thereby be required to consider overruling *Gregory* is simply wrong.

In *Banks,* the Fourth Circuit aptly explained the distinction between actual notice that a chapter 13 plan has been filed (which triggers a duty of inquiry upon general unsecured creditors) with actual notice that a discrete evidentiary dispute has been commenced. Writing for the Fourth Circuit, Senior Judge Baldock (sitting by designation from the Tenth Circuit), provides this explanation:

> Bankruptcy Rule 2002(b) does not require specific notice of plan provisions affecting a particular creditor, nor does it require the notice to be served in any particular manner or upon any particular person. 'There are many aspects to and actions that may be taken in bankruptcy cases which affect the general administration of the case and all creditors generally, but none specifically.' *In re Boyken*, 246 B.R. 825, 828-29 (Bankr. E.D. Va. 2000). Generally such matters

require "notice," but not service of process. *Id.* When the rights of specific parties become an issue, however, service of the initiating motion or objection on the affected party is required. *Id.* FED. R. BANKR. P. 7003, 7004. Mailing the proposed plans, the hearing notice and the confirmation order satisfied the notice requirement under Rule 2002, but not the service and summons requirement of 7004. . . .

The district court properly concluded due process entitles a student loan creditor to specific notice of the Debtor's intent to discharge any portion of the debt. Section 523(a)(8) "explicitly precludes the discharge of the debtor['s] student loan debts absent a showing of undue hardship." The Bankruptcy Code and Rules require debtors to bring an adversary proceeding to establish undue hardship. FED. R. BANKR. P. 7001(6). . . . Initiation of an adversary proceeding requires a summons and service of process under Rule 7004(b). FED. R. BANKR. P. 7003, 7004. Banks failed to initiate an adversary proceeding to establish undue hardship. As a result, ECMC did not receive the requisite notice of Banks' intent to discharge post-petition interest on his student loan debts. For lack of adequate notice, the confirmation and discharge orders discharging the interest are not entitled to preclusive effect.

Id. at 301-02 (citations omitted, in part). In Footnote 4, the Fourth Circuit proceeds to make the following observation:

> We do not today hold that the Constitution in itself requires a summons and a service of process to discharge student loan debt. We merely confirm that where the Bankruptcy Code and Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect.

Ibid. Thus, the Fourth Circuit properly recognized that the Bankruptcy Rules establish procedural due process rights in bankruptcy cases.

THIS COURT HAS ESTABLISHED THE STANDARD FOR PROCEDURAL DUE PROCESS IN BANKRUPTCY CASES BY PROMULGATING THE BANKRUPTCY RULES

The Fifth Amendment to the Constitution does not expressly require a summons and service of process to discharge a student loan debt. However, this Court certainly has authority to articulate the ground rules for procedural due process in bankruptcy cases to ensure that property rights are not deprived without due process of law. The Ninth Circuit failed to grasp this principle when it rejected

the due process analysis from the Fourth, Seventh and Sixth Circuits,[12] stating that

> [w]e find it both wrong and dangerous to hold that the standard for what amounts to constitutionally adequate notice can be changed by legislation.

553 F.3d at 1204. This is the Ninth Circuit's most crucial and fundamental mistake. This Court, not Congress, set the standard for what amounts to constitutionally adequate notice.

Bankruptcy Code §102(1) provides that the phrase "after notice and a hearing means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances. . . ." In Code §102(1), Congress unmistakably co-opts the standard for procedural due process adopted by this Court in *Mullane*:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the

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[12] *See Banks, Ruehle v. Educational Credit Management Corp. (In re Ruehle)*, 412 F.3d 679 (6th Cir. 2005), *In re Hanson*, 397 F.3d 482 (7th Cir. 2005).

> required information, . . . and it must afford a reasonable time for those interested to make their appearance. . . . But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might adopt to accomplish it.

Id. at 314. Acting pursuant to 11 U.S.C. §2075, this Court has specified "the forms of process, writs, pleadings and motions, and practice and procedure in cases under Title 11" by adopting the Bankruptcy Rules. This clearly articulates the standard for procedural due process in bankruptcy cases.

The practice of burying "discharge by declaration" language in chapter 13 plans by debtors' counsel who know that "a proceeding to determine the dischargeability of a debt" must be brought by adversary proceeding pursuant to Bankruptcy Rule 7001(6), clearly is not a means employed by one who is desirous of actually informing a student loan creditor that the issue of dischargeability has been brought into play. This is especially true of Francisco Espinosa, whose chapter 13 petition listed his student loans as his only debts. If Mr. Espinosa had actually wanted to inform USA Funds that he wished to contest the dischargeability of any part of his student loans, he would have commenced an adversary proceeding by filing a complaint, then served it together with a summons. Espinosa's failure to do this denied due process to USA Funds, and thus the

bankruptcy court's confirmation order is void pursuant to FRCP 60(b)(4) and Bankruptcy Rule 9024.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

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139 (14)

No. 08-1134

In the Supreme Court of the United States

FILED SEP 4 - 2009

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

FRANCISCO J. ESPINOSA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the States of Oregon, Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, and the National League of Cities

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QUESTIONS PRESENTED

Section 523(a)(8) of the Bankruptcy Code provides that student loans are nondischargeable unless the debtor affirmatively shows that repayment of the loan would impose an undue hardship. In turn, Rule 7001(6) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rule") provides that the determination of dischargeability of a debt must be established in an adversary proceeding (a separate proceeding within a bankruptcy case that is litigated directly between the debtor and the other party). Finally, Bankruptcy Rule 7004 provides that an adversary proceeding, like a standard civil proceeding in federal court, is initiated by service of a summons and complaint on the defendant party. The questions presented are:

1. If a debtor ignores the requirements of Bankruptcy Rules 7001(6) and 7004 and purports to discharge a student debt through a Chapter 13 plan, rather than by an adversary proceeding, has the debtor satisfied the due process requirements of *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) – that a party must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections?"

2. If a debtor fails to satisfy those due process

requirements, is the plan confirmation order void with respect to the purported discharge or are its terms binding, under principles of *res judicata*, on a party that does not object to the proposed plan?

3. Does the bankruptcy court have authority to disapprove a plan that provides for actions that the Bankruptcy Rules state must be taken by adversary proceeding?

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U.S. DEPT. OF EDUC., FINANCIAL AND PERFORMANCE QUARTERLY UPDATE, Issue 2008-2 (Sept. 30, 2008) 17

STATEMENT OF AMICI INTEREST[1]

The Amici States frequently appear as creditors in bankruptcy cases and are often charged with collecting student loans, which are not discharged in bankruptcy unless a debtor successfully prosecutes an adversary proceeding. They hold other claims that are automatically excepted from discharge in Chapter 13;[2] the logic of the Ninth Circuit's analysis would also make those debts susceptible to discharge without the adversary proceedings required by the Bankruptcy Code and Rules.[3] Among those debts are claims arising from late or non-filed tax returns or taxes

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[1] The parties to the case received timely notice and have consented to the filing of this brief and the joinder of the National League of Cities ("NLC") to this brief; the consents have been filed with the Clerk of the Court. No counsel for a party authored this brief, and no person, other than the amici curiae, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief. For purposes of this brief, NLC is included within the term "Amici States."

[2] Chapter 13 of the Bankruptcy Code, 11 U.S.C. 1301 et seq. Citations herein will be to the provisions of the Bankruptcy Code, 11 U.S.C. 101 et. seq., ("the Code") unless noted otherwise.

[3] All citations to a "Rule" or "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure.

a debtor sought to fraudulently evade, fraud, unscheduled debts, domestic support obligations, drunk driving judgments, and criminal sentences – many of which were recently added by Congress when it expanded the scope of discharge exceptions in Chapter 13 in 2005 in the Bankruptcy Abuse Prevention and Consumer Protection Act (the "BAPCPA").[4] The Amici States have a substantial interest in ensuring that debtors' plans are not allowed to circumvent Congress's clear intent.

Taken together, the Bankruptcy Code and Rules provide that the bankruptcy court's authority to determine whether a particular debt fits into an exception from discharge must be exercised through an adversary proceeding – a separate action directed at and naming a single creditor. The proceeding must be initiated by a complaint that is served with a summons on an officer or other agent authorized to receive service of process for the creditor. That method of proceeding is distinct from that required to confirm a plan and provides notice of the proposed discharge with far greater force and clarity to a person who can reasonably be expected to understand the significance of that notice. Under the Ninth Circuit's analysis, however, those debts could be discharged by the mere inclusion of a

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[4] Pub. L. No. 109-8.

sentence in a Chapter 13 plan, sidestepping protections that creditors otherwise have.

The Ninth Circuit's analysis condones actions that contravene fundamental provisions of the Bankruptcy Code and Rules, creates a chaotic process in Chapter 13[5] that lays traps for the unwary, requires prudent parties (especially already financially stressed state agencies, schools, colleges, and universities) to incur unnecessary costs, and burdens courts and Chapter 13 trustees with reviewing plans multiple times – once when a plan with an improper provision is filed and again after a vigilant creditor demands its removal. The debtor's approach here – often referred to as "discharge by declaration" or "discharge by ambush" – is antithetical to his obligation to deal equitably with his creditors when seeking the benefit of a discharge and violates

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[5] The discussion herein primarily focuses on Chapter 13 because the vast majority of plans filed by individuals (for which the discharge exceptions are applicable) occur in Chapter 13 cases (as opposed to Chapters 11 and 12). Further, as discussed below, the financial stakes in the former cases are so much smaller that creditors cannot afford the same degree of scrutiny of hundreds of thousands of plans in such cases, compared to the relatively minute number of cases in the other chapters. The Rules, though, apply across the board in all chapters.

due process.[6]

The Amici States also appear in Chapter 13 cases to protect their secured claims and are concerned that debtors will use Chapter 13 plans to invalidate security interests, even though Bankruptcy Rule 7001(2) provides that actions to "determine the extent, priority, and validity" of liens must also be brought by adversary proceedings. The Amici States seek to ensure that their priority claims and liens – for taxes, for costs of environmental cleanups, and for a myriad of other purposes –are not lost in future ambushes by debtors.

The practical impact of the decision below is that creditors must *presume* that debtors will include unlawful provisions in their plans and omit legally-required notices. Even if large institutional creditors, such as petitioner, can adapt to this abusive tactic, the result will be increased collection costs that must be passed on to all bor-

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[6] While the Amici States, as governmental entities, are not entitled to due process under the Fifth Amendment, they still must receive notice which satisfies the requirement of fundamental fairness. *See United States v. Hairopoulos (In re Hairopoulos)*, 118 F.3d 1240, 1244 n. 3 (8th Cir.1997); *United States v. Cardinal Mine Supply*, 916 F.2d 1087, 1089 n. 3 (6th Cir.1990). Discharge by declaration violates that requirement.

rowers. This is particularly harmful in the student loan area because the costs of collection are not allocated to the specific debtors who force such costs to be incurred, but rather are imposed *pro rata* on all other student debtors.[7] Similarly, the taxpayers of the Amici States will be forced to assume the added burdens of forcing debtors to play by the rules of the bankruptcy system they have chosen to invoke. Finally, the Amici States' citizens who hold nondischargeable judgments may find that the debtor has eliminated their rights through the simple expedient of a plan provision.

The added costs imposed by the decision below will be increased even further by virtue of the Ninth Circuit's final ruling in the case – namely, that bankruptcy courts may not act *sua sponte* to bar confirmation of abusive plans or to police the actions of debtors and their counsel. The original outbreak of "discharge by ambush" cases ended in large part because bankruptcy courts, acting under their own authority, warned practitioners of their disapproval and of the possibility that such

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[7] *See Black v. Educational Credit Mgmt. Corp.*, 459 F.3d 796, 800-01 (7th Cir. 2006) (upholding imposition of collection costs as uniform percentage of debt owed).

provisions could lead to sanctions.[8] By barring such review, the Ninth Circuit's holding immunizes practitioners and suggests that a debtor's attorney should always take the chance of seeing if such a provision will go unnoticed. In an era of unprecedented budget shortfalls, the Amici States are deeply concerned that they not be forced to shoulder unnecessary costs to protect themselves from debtors who refuse to abide by the Code and Rules.

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[8] *See, e.g., In re Mammel*, 221 B.R. 238, 243 (Bankr. N.D. Iowa 1998) (denying confirmation of plan with discharge provision, and describing practice as "trap for unwary creditors" that "trivializes the entire process and reduces it to a game of chance"); *In re Evans*, 242 B.R. 407, 411-13 (Bankr. S.D. Ohio 1999) (ordering debtor's counsel to show cause why provision did not violate Bankruptcy Rule 9011); *In re Hensley*, 249 B.R. 318, 323-24 (Bankr. W.D. Okla. 2000) (deeming counsel's intentional inclusion of discharge language unethical and sanctionable)); *In re Lemons*, 285 B.R. 327, 333 (Bankr. W.D. Okla. 2002) (imposing sanctions for use of discharge language and admonishing counsel); and *In re Wright*, 279 B.R. 886, 889 (Bankr. D. Kan. 2002) (noting that absent good-faith basis, inclusion of discharge provision in hope of trapping unwary student loan creditor should result in sanctions). *Cf. Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992) (explaining that while frivolous exemptions were binding if not objected to, result would not immunize debtor's counsel from sanctions).

STATEMENT OF CASE

In 1988-89, Espinosa obtained various student loans. In 1992, he filed a Chapter 13 case that listed his student loans as his only debts, proposed to pay only the principal, and stated that any unpaid amounts would be discharged. He did not file an adversary proceeding nor did his plan assert that payment of the interest would be an "undue hardship."[9]

Further, instead of serving an officer, managing or general agent, or other agent authorized to receive service of process with a summons and complaint as required by Bankruptcy Rule 7004(a) and (b)(3), Espinosa only mailed a copy of his plan to a post office box where payments on his loans were sent. The guarantor (the petitioner herein) did not object to the plan. After it was confirmed and Espinosa completed his payments, a standard discharge order was entered in 1997, providing that student loan debts were excepted from discharge. Espinosa did not object to the entry of that order or seek to have it corrected. In 2000, the Education Department began collection efforts and caused Espinosa's income tax refunds

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[9] Compare *Andersen v. UNIPAC-NEBHELP (In re Andersen),* 179 F.3d 1253 (10th Cir. 1999) in which the debtor asserted that payment of additional amounts beyond that set out in the plan would constitute an "undue hardship."

to be intercepted. Three years later, he filed a motion alleging that those actions violated the discharge injunction. The guarantor moved, under Federal Rule of Civil Procedure 60(b)(4), for relief from the confirmation order (which had approved the plan with the discharge language). The bankruptcy court ruled for Espinosa, though, finding that the confirmation order's terms controlled over the contrary language in the discharge order.

The district court reversed, holding that the confirmation order was void for lack of due process because of the absence of an adversary proceeding. On further appeal, after the bankruptcy court corrected the discharge order as a clerical error, pursuant to Bankruptcy Rule 9024 (the counterpart to Federal Rule of Civil Procedure 60(a)), the Ninth Circuit reversed the district court and entered the order at issue here, upholding the bankruptcy court's ruling that *res judicata* barred any attack on the plan's terms. *In re Espinosa*, 553 F.3d 1193 (9th Cir. 2008). The guarantor's petition followed.

ARGUMENT

The Ninth Circuit's analysis reduces to a few basic – but fallacious – propositions. First, despite Bankruptcy Rule 7001(6), which requires an adversary proceeding and proof of undue hardship to discharge a student loan debt, a debtor's

plan may simply provide that the debt will be discharged. Second, despite the requirement in Bankruptcy Rule 7004 that an adversary proceeding must be brought by means of a complaint and summons served upon specified parties at a specified address, the debtor may mail a copy of the plan to a different, generic address and not name those parties. Third, the creditor cannot assume that legal requirements for notice will be complied with, and fourth, violation of the Rules has no relevance to whether due process has been accorded to litigants pursuant to *Mullane*. Rather, due process merely requires some generic degree of notice, even if that form of notice *violates* a rule or statute and even if a creditor could be misled by the absence of the required notice.

At the outset, it is important to clarify that the Amici States fully understand this Court's decisions concerning the general finality of confirmation orders. In particular, they are mindful of this Court's recent holding in *Travelers Indemnity Co. v. Bailey,* 129 S.Ct. 2195 (2009), that principles of *res judicata*, in general, protect plan provisions from collateral attack. However, as this Court noted, *res judicata* does not protect an order that was entered in violation of due process. *Id.* at 2207. It is that lack of due process that distinguishes this situation from that in *Travelers* and similar cases.

Five other circuits have correctly reasoned

that the use of a plan provision to create a "discharge by declaration" violates due process. It is not simply that the provision in the Espinosa plan substantively violated the Bankruptcy Code (although it plainly did); it is also the fact that the discharge of a nondischargeable debt was obtained by means of plan confirmation, even though the Bankruptcy Rules undeniably mandate a different and more demanding process with heightened notice. It is the combination of those violations that sets the dividing line between the issues the Amici States concede are governed by *res judicata* and those that are not. If a matter may lawfully be decided in the plan confirmation process, the fact that a proposed provision violates the Code is not necessarily enough to eliminate the application of *res judicata*. But, if the Code and the Rules make clear that the proper procedure is an adversary proceeding, the right of the creditor to wait until it is sued in that manner before deciding whether or not to defend the action against it, cannot, consistent with due process and fundamental fairness, be extinguished by some other method of proceeding.

I. The Use of a Plan Provision to "Discharge" this Debt Violates the Code and the Rules

The Amici States adopt the discussion in the petitioner's brief of the structure under the

Bankruptcy Code and Rules for processing a claim that a particular debt should be discharged. They describe briefly this structure solely to show how widely the process used in this case missed the mark.

Section 523 specifies the debts that are excepted from discharge and the procedural requirements for dealing with those exceptions. Some types of debts are non-dischargeable only if the creditor timely brings an adversary proceeding to except the debt from the general discharge granted the debtor.[10] All other discharge exceptions, though, including the student loan exception set out at 11 U.S.C. § 523(a)(8), are self-executing and the creditor need do nothing.

If the debtor seeks to determine whether a particular debt fits within a discharge exception, he may file an adversary proceeding with the bankruptcy court or he can wait to be sued by the creditor and assert the discharge as a defense. In either case, the determination plays out in a formal litigation setting, between the only two parties that have any stake in it – the debtor and the creditor holding the claim.

Because discharge determinations are likely to be a critical issue for most creditors, the Bank-

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[10] Those exceptions are set out at 11 U.S.C. §§ 523(a)(2), (4), and (6).

ruptcy Code and Rules impose notice requirements that distinguish them from the vast mass of other paper work that flows through the bankruptcy system. Those special requirements give proper deference to the fact that Congress has specifically determined that certain debts should either not be discharged at all or should be discharged only if the debtor satisfies a stringent standard. Finally, as a practical matter, addressing discharge exceptions in an adversary proceeding ensures that the plan confirmation process is not burdened by one-creditor issues that do not affect other creditors or what the debtor must pay under the plan.

This Court recognized those principles in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 449-452 (2004), in which it described Section 523(a)(8) as "self-executing;" stated that the debtor must "affirmatively secure[] a hardship determination" to discharge a student loan debt; added that creditors are given "greater procedural protection" before such debts can be discharged; and held that an adversary proceeding must be filed to discharge the debt. This Court did, to be sure, state that "*absent Rule 7001(6)*, a debtor could proceed by motion . . . which would raise no constitutional concern," 541 U.S. at 453 (emphasis added), but Rule 7001(6) *does* exist and it *does* impose affirmative obligations on a debtor. The suggestion that *Hood* allows courts to

disregard Rule 7001(6) was rightfully rejected by *In re Hanson*, 397 F.3d 482, 487 (7th Cir. 2005). *Hood* states that Congress has discretion to decide when to give parties more than minimal due process; it certainly does not authorize courts to arbitrarily disregard the choice that Congress *has* made.

In any event, Espinosa's position is that the confirmation order is valid even if its entry violated the Code or the Rules, because some minimal form of notice *was* provided. Under that analysis, no due process violation could ever occur even if a creditor is misled by the debtor's failure to comply with the prescribed notice requirements. Indeed, according to the Ninth Circuit it would be "wrong and dangerous" to allow Congress to define what due process requires. *Espinosa*, 553 F.3d at 1204.

The Amici States assert, to the contrary, that, while Congress cannot approve a procedure that falls below the Constitutional minimum for due process, it certainly may determine in certain cases that due process requires that parties receive more than that constitutional minimum. And, Congress having done so, those parties are entitled to rely on that grant of rights and act accordingly. Denying those rights violates due process under *Mullane* because one of the "circumstances" that must be considered is the collection of rights parties have been informed that they

possess and can rely on having. That is true in any civil proceeding; it is critical in the unique scenario posed by bankruptcy proceedings.

II. Bankruptcy's Unique Nature Demands a Consistent Application of the Rules.

Bankruptcy is quantitatively different from any other federal litigation and that fact explains the many differences in the way cases are handled. Bankruptcy filings are far more numerous than all other federal cases combined – and the ratio between the two has increased dramatically during the last twenty years. In 1988, when Espinosa took out his loans, there were 549,612 nonbusiness bankruptcies. By 1992, when he filed his petition, that number had soared to 900,874, and by 1997, when he received a discharge, the number had grown by another 50 percent to 1,350,118. From 1998 to 2004, the number varied between a low of 1,217,972 in 2000 and a high of 1,625,208 in 2003.[11]

While it was frequently suggested that enactment of the BAPCPA would lead to a reduction in

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[11] All filing rates taken from charts maintained by American Bankruptcy Institute: http://www.abiworld.org/AM/AM Template.cfm ?Section= Home&TEMPLATE=/CM/Content Display.cfm& CONTENTID =56822. All websites were viewed on April 7, 2009, unless otherwise stated.

case filings, and while that did initially occur after its enactment in 2005, filings have increased every year since then. [12] For 2009, they are likely to return to the roughly 1.4-1.5 million average that predated the BAPCPA. As of the second quarter of 2009, filings totaled 1.3 million for the prior twelve months, but the June 2009 quarter alone had 381,000 filings. On an annualized basis, the June rate translates into 1.524 million filings.[13]

By contrast, in 1988, there were 43,670 federal criminal and 240,232 federal civil cases filed, or about 1 for every 2 bankruptcy filings.[14] In 1993, there were 46,786 federal criminal and 229,850

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[12] 620,000 petitions were filed in October 2005 to beat the BAPCPA's effective date, resulting in a total of more than two million cases in 2005. *See* http://www.abiworld.org /AM/Template.cfm? Section= Home& TEMPLATE=/CM/ContentDisplay.cfm &CONTENTID=42631. Case filings dropped to 600,000 in 2006, then rose to 800,000 in 2007 and to more than one million in 2008.

[13] *See* http://www.uscourts.gov/Press_Releases/2009/BankruptcyFilings Jun2009.cfm, issued by Administrative Office of the U.S. Courts, viewed on August 19, 2009.

[14] Federal Judicial Workload Statistics, Tables C, D, F-2, issued by Administrative Office of the U.S. Courts, December, 1988.

federal civil cases filed, for a total of 276,636 cases,[15] still less than one for every three of the almost 900,000 bankruptcy filings. By 1997, though, other federal filings had risen only to 322,390, compared to 1.37 million bankruptcy filings – now a 1 to 4.2 ratio. Nonbankruptcy filings have varied little in recent years, averaging about 340,000 cases a year from 2004 to 2008,[16] as compared to bankruptcy filings which have returned to the 1.5 million range and the 1 to 4.2 ratio.

The reality is that bankruptcy, at least for consumer debtors, is a high volume, highly standardized practice in which lawyers and the courts use software packages, form pleadings, standard plans, "no look" fee approvals, and the like to handle the wholesale business of processing hundreds of thousands of petitions each year. Unlike a typical two-party dispute in civil or criminal litigation, bankruptcy almost inevitably involves unrelated claims by many different parties against the debtor. Those claims may arise under

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[15] *See* http://www.uscourts.gov/judicial business/judbus.pdf p. 12, issued by Administrative Office of the U.S. Courts, viewed on August 28, 2009. (Statistics are for FY 93, beginning October 1992).

[16] *See* http://www.uscourts.gov/judbus2008/contents.cfm for statistics for 2004-2008, Tables S-7 and D-2, viewed on August 19, 2009.

state law, federal nonbankruptcy law, or the Code, and the debtor (or trustee) must decide whether to accept or dispute them, in addition to contesting liens, defending challenges to exemptions, and administering property of the estate. Further, in Chapter 11, 12, and 13 cases, debtors have broad leeway to propose plan terms, and creditors may vote on or object to those proposed plans. Finally, the debtor and his creditors may litigate either his right to a general discharge or request that specific debts be discharged.

In this high-volume arena, creditors need to be able to rely on the rules. That need increases geometrically when a single defendant, such as a student loan creditor – or a taxing authority of the Amici States – is faced with literally thousands or tens of thousands of cases a year.[17] To cope with those filings in an economically realistic fashion, creditors must set up automated systems, delegate work to paralegals, and train secretarial staff as to which matters must be brought to counsel's attention and which do not

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[17] As noted by the petitioner, the federal student loan programs service more than $500 billion of loans. The petitioner states it received notice of 24,411 bankruptcies in 2008 alone. U.S. DEPT. OF EDUC., FINANCIAL AND PERFORMANCE QUARTERLY UPDATE, Issue 2008-2, at 7 (Sept. 30, 2008).

require further action.

This cacophony of actions would produce chaos absent the carefully-orchestrated provisions of the Code and the Rules which create detailed procedural mechanisms with specific notice, timing, and objection provisions for each type of action. There are 86 Federal Rules of Civil Procedure for district court litigation. By contrast, those rules are largely subsumed in only *one* chapter of the Bankruptcy Rules. There are an additional *eight* chapters of bankruptcy rules, spelling out how the case is to proceed. Virtually every bankruptcy court also has detailed local rules to further help guide, channel, and control the thousands of cases they handle each year.

That multitude of proceedings, moreover, takes place on a highly compressed schedule compared to normal federal litigation, especially in Chapter 13.[18] Moreover, the Bankruptcy Code

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[18] Chapter 13 plans must be filed no later than 15 days after the petition date. Bankruptcy Rule 3015(a). The confirmation hearing must be at least 20 days after the Section 341 meeting of creditors, which in turn, under Bankruptcy Rule 2003(a) and Section 1324(b), is to be held between 20 and 50 days after the case is filed. Thus, the plan confirmation hearing could be as early as the 40th day of the case and only 25 days after the plan is filed. Before 2005, no minimum period existed between the petition date and the confirmation hearing.

and the Rules are far more stringent in many respects about challenges to decisions than the rules that govern other federal litigation. Section 363(m), for instance, precludes a sale to a good faith purchaser from being overturned unless a stay has been obtained. Notices of appeal must be filed within 10 days rather than 30 (compare Bankruptcy Rule 8002(a) to Federal Rule of Appellate Procedure 4(a)(1)). Confirmation orders in Chapter 13 can only be overturned for fraud and only for six months.[19]

And, in yet another example of the stringent application of the Rules in bankruptcy, even a frivolous claim of exemption can be enforced unless the trustee challenges the claim within the required deadline. *See Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). The Court is currently scheduled to hear a case this term, *Schwab v. Reilly*, No. 08-538, 129 S.Ct. 2049 (2009), in which the Third Circuit held that a trustee had to challenge not only facially invalid exemptions, but also those that implicitly could be read to assert an improper claim. Failing to do so, the Third Circuit held, barred the trustee from later contesting the debtor's ability to claim the improper amounts that it had impliedly exempted. In short, in light of the severe consequences the Bankruptcy Code and Rules visit upon parties

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[19] §1330(a).

that fail to take a required step, it becomes even more critical for notice requirements to be followed and consistently enforced.

That is particularly true when a third significant reality of Chapter 13 cases is considered, namely, that despite the large amount of litigation that may arise in any given case, these are, on average, very low-dollar proceedings. In fiscal year 2008, for instance, payments made through Chapter 13 cases totaled some $5.2 billion, of which only $1.2 billion dollars went to pay the claims of *all* unsecured creditors.[20] Divided by the roughly 353,000 Chapter 13 cases filed in 2008,[21] that resulted in an average payout to *all* unsecured creditors of only $3400 per case. When potential recoveries are so small, unsecured creditors like student loan guarantors generally can expect little from the plan itself. Rather, their primary hope of return is for their debt not to be discharged so they can resume collection activities after competing obligations are discharged.

A creditor with a nondischargeable claim will

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[20] *See* http://www.usdoj.gov/ust/eo/private_trustee/library/chapter13; Chart ch13ar08AARpt.xls – FY-2008 Chapter 13 Trustee Audited Annual Reports. Viewed on August 19, 2009.

[21] *See* http://www.uscourts.gov/Press_Releases/2008/BankruptcyFilings Dec2008.cfm.

have little reason to fear the plan's treatment of its claim, if the plan cannot discharge the debt. Rather, the debtor has every incentive to pay as much as possible on the nondischargeable debt during the case and, indeed, to give such debts preferential treatment to reduce the amount he will need to pay after the bankruptcy. Courts differ on whether such treatment is allowed;[22] the salient point is that, if the plan cannot discharge the debt, the debtor has no reason to underpay that creditor. The creditor, in turn then, can direct its limited resources to defending *bona fide* challenges brought via adversary proceedings.

On the other hand, if debtors may ignore both substantive and procedural requirements, they have every reason to seek approval of plans that discharge debts improperly. If, as the Ninth Circuit ruled, such plans are absolutely protected if the creditor does not object, and if bankruptcy courts are precluded from policing them *sua sponte*, then debtors, at least initially, will be successful in gaining unwarranted benefits. While large creditors with many cases presumably will learn to adapt their actions to this new regimen (*albeit* at substantial, unnecessary cost and burden to all parties), occasional creditors

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[22] *See* discussion of contrasting lines of cases in *Marshall v. Belda (In re Belda)*, 315 B.R. 477, 482-86 (N.D. Ill. 2004).

may not learn until too late that they were foolish to have assumed that the Rules applied to debtors too.

III. Failure to Provide a Party with the Notice Required by the Rules Denies That Party Due Process

The Ninth Circuit's ruling puts it squarely in conflict with five other circuits[23] – a fact that it readily conceded. Moreover, it was forced to overrule both the district court in this case and the Ninth Circuit Bankruptcy Appellate Panel ("BAP") in *In re Repp,* 307 B.R. 144 (9th Cir. BAP 2004), *reversed by Espinosa,* 553 F.3d at 1204, n. 6. In each of those cases, the creditor did not object to the plan or appeal from confirmation, but sought to collect the debt after the plan ended, only to be met by the contention that the con-

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[23] *Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 154-55, 156, n.2 (2nd Cir. 2005) (using plan process makes discharge provision "void *ab initio*"); *Banks v. Sallie Mae Servicing Corp.*, 299 F.3d 296, 300 (4th Cir. 2002); *In re Ruehle*, 412 F.3d 679, 682-83 (6th Cir. 2004); *In re Hanson*, 397 F.3d 482, 486 (7th Cir. 2005); *Educ. Credit. Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir., 2007) ("§ 1325(a)(1) . . . permits the confirmation of a plan *only* if it is consistent with the rest of the Code"; "bankruptcy court lacks authority to confirm" plan that does not use adversary proceeding).

firmed plan was *res judicata*. In each case, the Court of Appeals held that *res judicata* did not apply because the orders were void because the debtor had violated due process requirements by failing to initiate an adversary proceeding or to provide proper notice. Because of those violations, it was impossible to satisfy one of the conditions for the application of *res judicata*, namely that the defendant had received a full and adequate opportunity to litigate the issues. Compare the Tenth Circuit's decisions in *Andersen v. UNIPAC-NEBHELP* (*In re Anderson*), 179 F.3d 1253 (10th Cir. 1999), which utilized the *res judicata* approach, with its *en banc* decision in *Mersmann*, 505 F.3d at 1049, where it reversed its earlier position once the due process argument was presented.

The same analysis has also been applied to the use of plans to purportedly invalidate liens in circumstances where Bankruptcy Rule 7001(2) requires an adversary proceeding. Three circuits have held that doing so violates due process and have invalidated provisions in plans that attempted to avoid liens. *See In re Mansaray-Ruffin*, 530 F.3d 230, 235-36 (3rd Cir. 2008); *In re Bateman*, 331 F.3d 821, 830-833 (11th Cir. 2003); *Cen-Pen Corp. v. Hanson*, 58 F.3d 89 (4th Cir. 1995). Indeed, in both *In re Brawders*, 503 F.3d 856, 869-870 (9th Cir. 2007) (affirming decision by BAP), and *In re Enewally*, 368 F.3d 1165, 1173

(9th Cir. 2004), the Ninth Circuit had, until the decision below, been consistent with its sister circuits, confirming that due process requires that matters that must be raised in an adversary proceeding cannot be determined by a plan. The decision in this case has left that court at odds not only with the other circuits, but even itself.[24]

The distinction between using an adversary proceeding versus plan language to discharge a debt is not merely semantics. Plan language is a short and simple statement of the debtor's intentions; it requires neither explanation nor justification. That is particularly true in Chapter 13 cases in which plans are often form documents, prepared in a "fill in the blanks" format, comprising only a few pages. Moreover, the debtor need not even serve the full Chapter 13 plan on creditors, but is permitted to provide a mere summary. *See* Bankruptcy Rule 3015(d), Section 521(e)(3) (full plan must be provided to a creditor *only* if it requests the plan and pays for the copy it receives).

Adversary proceedings, by contrast, are com-

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[24] The decision below purported to distinguish the language in *Enewally* as being mere dicta – but the Bankruptcy Appellate Panel's decision in *Brawders*, which was affirmed by the Ninth Circuit, was clearly based on a reading of *Enewally* consistent with the petitioner's view here.

menced by filing a complaint that must, under Bankruptcy Rules 7004 and 7008, show "that the [debtor] is entitled to relief" and describe the specific relief sought. Thus, unlike a debtor's bare assertion in a plan that a student loan debt should be discharged, a complaint must assert facts that demonstrate undue hardship. *Bell Atlantic v. Twombly*, 550 U.S. 544 (2006) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Moreover, the complaint must name the specific party in interest and be served with a summons on a high-level official or person designated to receive service. The combination of the formal structure of a complaint, coupled with heightened notice provisions, ensures that a responsible person at the creditor will be alerted in a clear and direct fashion that the creditor's *specific* interests are being challenged and that it must take heed of those interests or suffer a default. That process is surely more likely to ensure that the creditor will respond to the challenge than merely sending a copy of the plan to a post office drop box.

Congress has every right to protect creditors with nondischargeable debts by granting them that added level of notice. It is not difficult to understand why Congress would have made that choice in light of the practical realities of bankruptcy cited above. Large creditors, like USA Funds, receive "tidal waves of mail. . . . The quantity 'of notice' that is issued by the bank-

ruptcy system is so overwhelming that it is necessary to have clear rules in order for creditors to know what notices to notice as opposed to the notices that are deafening legal background noise. The Code and the Rules set forth those clear standards and it is up to the courts to ensure that the lines are not blurred." *In re Ruehle*, 412 F.3d 679, 684 (6th Cir. 2004).

As this Court stated in *Mullane*, due process requires "notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* 339 U.S. at 314 (emphasis added). The other Circuits have concluded that, at a minimum, those "circumstances" include the fact that parties have been promised a specific level and form of proceeding and of notice. *See, e.g., Banks*, 299 F.3d at 302 ("due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect"); *Ruehle*, 412 F.3d at 684-85 (parties are "entitled to the prescribed level of notice for the process to be due"); *Mersmann*, 505 F.3d at 1049 ("creditor has a right to assume that he will receive all of the notices *required by statute* before his claim is forever barred")(emphasis by *Mersmann* court).

This Court took the same view in *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953), where it considered whether

a party could be bound by a confirmation order when it knew of the case but had not been mailed notice of the hearing on the plan as required by the Bankruptcy Act and rules. This Court rejected the argument that knowledge of the case would put a party on inquiry notice so that it would be obligated to take steps to learn of the hearing, stating that "even creditors who have knowledge of a reorganization have a right to assume that the *statutory* 'reasonable notice' will be given them before their claims are forever barred." (Emphasis added).[25]

The same is true here – the creditors have been told that any attempt to discharge their debt will take place in an adversary proceeding and that they will receive a particular form of "reasonable notice" of the commencement of that proceeding. The debtor, though, brought a differ-

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[25] Under other circumstances (*i.e.*, in Chapter 7 and 13 cases where the Rules are far more specific about the timing and sequence of bar dates in the case), parties may be required to inquire. *See In re Metzger*, 346 B.R. 806, 817-19 (Bankr. N.D. Cal. 2006), explaining the differences and noting the effect of varying statutory provisions in the different chapters. Thus, it is clear that there is no one single-size notice that satisfies all constitutional duties; plainly, though, the decision by Congress to specify a particular form of notice and proceeding is entitled to deference.

ent form of action and provided a different, lesser, form of notice, but argues that the alternatives were "good enough." The Ninth Circuit agreed, holding that mailing a plan to a post office box would have been minimally adequate notice in a constitutional sense, in the absence of any specified provisions in the statute or Rule. It was immaterial to the Ninth Circuit's due process analysis, therefore, that what was done was not the form of service and proceeding that was *required* by an existing Rule for this particular circumstance.

That conclusion, though, ignores the critical distinction between being told nothing about what is required, and being promised that matters would proceed in a particular way. If nothing had been said in the Code or Rules about how undue hardship would be decided, the creditor would have no alternative but to examine each paper it received with care to determine if a discharge action was lurking within. But, because the Code and Rules specify a particular form of proceeding and notice, creditors have a right to rely on those specifications and to adjust their monitoring efforts accordingly. They should not have to assume that the party providing notice will ignore the Rules and the Code and substitute its own procedures.

Indeed, as noted by the Ninth Circuit Bankruptcy Appellate Panel in *Brawders* (in a decision

affirmed by the Ninth Circuit), it had previously held that "the greater the deviation from the process set out in the rules, 'the greater the quality and amount of notice needed in order to comply with due process.'" *Brawders*, 503 F.3d at 870-71 (BAP decision *citing GMAC Mortgage Corp. v. Salisbury (In re Loloee)*, 241 B.R. 655, 662 (9th Cir. BAP 1999)). It further noted that it had held, in *Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 497 (9th Cir. BAP 2003), that to include a claims objection in a Chapter 11 plan,

> considerations of due process mandate great caution and require that the creditor receive specific notice (not buried in a disclosure statement or plan provision) of at least the quality of specificity, and be afforded the same opportunity to litigate one-on-one, as would be provided with a straightforward claim objection under Rule 3007.[26]

In short, the more one decides to ignore the re-

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[26] Indeed, Bankruptcy Rule 3007 was amended, as of December 1, 2007, to limit the number and types of objections in a single pleading and to bar inclusion of adversary matters in a claims objection. Thus, it is clear that the Rules drafters and Congress have recently opted to require more notice to creditors, not less, in contrast to the Ninth Circuit.

quirements established by the Code and the Rules, the more likely it is that parties will be misled in a way that is fundamentally unfair and that violates the due process rights of those who justifiably relied on those provisions.

The decision below brushes aside these considerations and suggests that a party risks waiving its rights when it does not respond to *any* form of information that it receives that might implicate its claims. That is simply not the case, though. A party that receives by regular mail a civil complaint, without personal service, has no duty to respond, despite his full knowledge of its contents. It is only when proper personal service is obtained under Federal Rule of Civil Procedure 4 that the defendant has an obligation to defend the suit. [27]

The Bankruptcy Rules provide for service of a complaint by mail in Rule 7004(b) in addition to personal service, but Rule 7004(b)(3) nonetheless requires service on an "officer, managing or general agent, or [] any other agent authorized by appointment or by law to receiver service of process." Mailing a plan notice to a lockbox does not

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[27] Of course, a plaintiff could include a request to waive service under Fed. R. Civ. Proc. 4(d)(1). To actually waive the right to formal service, though, a proper party must sign the waiver, thus ensuring the equivalent of personal service.

satisfy that obligation, much less the requirement that the document at issue must be an adversary complaint. Even assuming the plan document here ever came to the attention of a responsible official of petitioner (an assumption for which the Ninth Circuit cites no evidentiary support), the fact remains that a party receiving a plan with a provision that cannot lawfully be decided in that context is not required to object thereto.

That principle is part of the bedrock of jurisdiction in and outside of bankruptcy; there is nothing about the discharge or Chapter 13 plan process that dictates a different result. *See, e.g., Hamlett v. Amsouth Bank (In re Hamlett)*, 322 F.3d 342, 345-46 (4th Cir. 2003) (default judgment vacated because service made on registered agent of depository institution, not "officer," as required in Rule 7004(h)); *In the Matter of McMahon (Miller v. Homecomings Fin. Network, Inc.*, 2008 Bankr. LEXIS 3635, *9-10 (Bankr. N.D. Ind. 11/18/08) (failure to address summons to attention of corporate officer, as opposed to merely corporation, as required by Rule 7003(b)(3), made service defective and allowed for lifting of default judgment); *In re E-Z Serve Convenience Stores, Inc. et al.(CIT Group/Business Credit, Inc., vs. Official Committee of Unsecured Creditors of E-Z Serve Convenience Stores, Inc., et. al)*, 318 B.R. 631, 635-36 (Bankr. M.D.N.C.

2004) (reconsidering order avoiding creditor's lien because relief sought by motion rather than adversary proceeding).

Espinosa's position here stands that principle on its head by asserting that he is not bound by the Rules; rather, he may devise whatever forms of proceeding and service he chooses and, if the court believes those efforts are minimally likely to bring the matter at issue to the creditor's attention, the creditor is bound. That cannot be the law because it leaves every other party in the case unsure of what it must do to protect its rights, particularly in the high-volume, low-payment reality of Chapter 13 cases.

If the Rules had said, "no action can be taken to discharge a debt unless the notice is sent in a blue envelope," a creditor could reasonably judge that it need not read mail in white envelopes if it is only concerned with discharge actions. The result should be no different here. The Ninth Circuit considered the violation of the Rules to be wholly irrelevant, stating that the guarantor was sophisticated and that it was "highly unlikely" that it was misled by "customary bankruptcy procedure," *Espinosa,* 553 F.3d at 1205. That would be true, though, only if is "customary" for debtors to ignore the Code and the Rules. Indeed, it is more likely that a "sophisticated creditor" – that is, one conversant with the pertinent statute and rules – would be misled because of its reliance

thereon. A bankruptcy novice with only a single case might not read the Rules and – unlike larger creditors – might have time to read every single piece of paper with which it was served.

A comparison of the facts in *Mullane* to those here shows how far the Ninth Circuit's method of analysis strays from that required by this Court. In *Mullane*, a trustee sought to settle his accounts in a situation where thousands of parties were involved, there was no reason to assume he had done anything wrong, and he could not ascertain names and addresses for many of those parties. He sought to proceed under a state law that explicitly *allowed* publication notice to *all* parties in such circumstances. Even though this was the only action involving those beneficiaries, and even though they might be thought responsible for learning the state law and gauging their monitoring accordingly, this Court held that publication notice was not sufficient. It could be used for unknown creditors, because no better method was available, but known creditors were entitled to actual service. Due process, this Court held, is not a mere gesture, but is measured by the steps a person takes who truly wants to communicate with another.

The Ninth Circuit's holding below, by contrast, applies even when a debtor *violates* the Rules and the Code, the plan takes away the creditor's rights, the debtor can expect opposition from the

creditor, there is a manageable number of creditors to notify, and the debtor can readily obtain information to effectuate proper service. In the world of Chapter 13, debtors know that creditors managing large case loads will rely on the Rules and the Code to determine the level of their monitoring efforts. Allowing debtors to exploit that reliance by violating the Rules and the Code does not satisfy *Mullane's* requirements; it is the antithesis of *Mullane*. *Mullane* does not dictate a "one size fits all" form of notice for due process purposes; it requires a consideration of "all of the circumstances." The fact that, in *some* circumstances, due process may not require that the party receive actual notice at all (for example, when publication notice is the only possible means to attempt service), surely does not dictate the Ninth Circuit's opposite conclusion that any form of actual notice will automatically satisfy due process. In its amendatory opinion, reported at 553 F.3d 1193, the Ninth Circuit held that it was "bizarre" to assume that the Constitution might require anything more than actual notice.

In fact, what is bizarre is the court's implicit conclusion that parties should be penalized for relying on notice requirements mandated by Congress.[28]

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[28] Indeed, the Ninth Circuit in its original opinion had overruled the BAP's decision in *Brawders*, which

It is clear, as the other five circuits have held, that adherence to the principles enunciated in *Mullane* and *City of New York* means that a debtor may not obtain a binding order discharging a debt unless the debtor complies with the requirements Congress has established for obtaining that order. Failing to follow those procedures means that the creditor has been denied due process and that the confirmation order is void with respect to that provision. Accordingly, the actions of petitioner here did not violate the discharge injunction.

By contrast, the Ninth Circuit's opinion reinvigorates the concept of discharge by ambush. It creates uncertainty and leaves parties to grapple with an amorphous balancing process despite the fact that Congress has prescribed the proper process with complete clarity. Under the Rules, the result is simple – either a summons and complaint are prepared and served on a proper party, or they are not. But under the Ninth Circuit's approach, courts must decide whether some other,

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explicitly held that greater degrees of notice had to be given if a party violated the Rules. In the revised opinion, though, it reversed its position and left *Brawders* intact, thus retaining a decision whose holding directly contradicted this statement. Thus, again, the Ninth Circuit's holdings contradict each other as well as those of other circuits.

lesser form of process is adequate under the circumstances of each particular case. The Ninth Circuit's approach imposes added costs and burdens on an already overcrowded bankruptcy system and provides no countervailing benefits. Those difficulties will increase in light of the new exceptions to the Chapter 13 discharge, which will give debtors even greater incentives to evade the Rules than before the passage of the BAPCPA. It is critical that this Court reverse this holding before it spurs another round of abuse.

IV. A Creditor's Failure to Object to a Plan Provision Does Not Bar the Bankruptcy Court From Acting *Sua Sponte* to Review the Plan

Perhaps the most troubling aspects of the opinion are the Ninth Circuit's twin assertions: first, that a creditor's failure to file an objection suggests its affirmative consent to the discharge of the debt owed to it, and second, that such purported "consent" made it improper for the bankruptcy court to raise a *sua sponte* challenge to the plan's terms.

First, there is no apparent evidentiary basis for the Ninth Circuit's suggestion that the guarantor here, or a creditor in general, that does not object to a plan in which its claim is purportedly discharged actually *agrees* to that discharge. Because a creditor may both receive partial pay-

ment under a plan and have the balance excepted from discharge, it is unclear why it would ever agree to accept the payment and allow the discharge. But, assuming a creditor was willing for its debt to be discharged, it can always state that consent affirmatively to the debtor, or it can default on its response to the adversary complaint when filed. The assumption that silence, in the face of unlawful provisions, implies actual consent will only increase the procedural free-for-all occasioned by this ruling.

The other aspect of the ruling – that bankruptcy courts are *not allowed* to challenge illegal provisions *sua sponte* – ignores the broad policing powers granted to bankruptcy courts by Section 105(a). That section states:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Courts have relied on that authority to enforce Rule 7001 and the substantive provisions of the Code that determine how student loans may be

discharged. The Ninth Circuit now holds that they may not independently do so. It erred in so holding.

Section 1322(b)(11) provides that a Chapter 13 plan may contain any provision "not inconsistent with this title." Section 1325(a)(1) provides that the court "shall confirm a plan if . . . (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title." And, finally, Section 1325(a)(3) states that the court shall confirm a plan if ". . . (3) the plan has been proposed in good faith and not by any means forbidden by law." Thus, Congress has thrice stated that plans must only contain lawful provisions and that courts are to confirm *lawful* plans. A plan that discharges a student loan debt with no showing of hardship violates Section 523(a)(8) and Section 1328(a)(2).

Numerous circuits have concluded that the provisions of Section 1325 are binding obligations that the debtors must follow – and that courts are to enforce in deciding whether to confirm a plan. *See, e.g.*, the extensive discussion in *Shaw v. Aurgroup Financial Credit Union*, 552 F.3d 447, 452-58 (6th Cir. 2009) (citing, *inter alia,* three decisions of this Court referring to Section 1325 as requirements a plan *must* satisfy to be confirmed) and *Mersmann*, 505 F.3d at 1048, 1049 ("§ 1325(a)(1) . . . permits the confirmation of a plan *only* if it is consistent with the rest of the Code";

"bankruptcy court lacks authority to confirm" plan that does not use adversary proceeding). The Third Circuit in *In re Szostek*, 886 F.2d 1405 (3d Cir. 1989), did use broad language suggesting in dicta that those provisions were not mandatory. Notably, the Ninth Circuit, in *In re Barnes*, 32 F.3d 405, 407 (9th Cir. 1994), was among the circuits that *rejected* the Third Circuit's approach and deemed the requirements of Section 1325(a) mandatory. Moreover, even the Third Circuit has held, in *Mansaray-Ruffin*, 530 F.3d at 237-38, that general *res judicata* provisions do not allow a debtor to avoid a lien through a plan provision where the Rules require an adversary proceeding – a situation precisely analogous to the discharge provision at issue here.

It is plainly inconsistent then for the Ninth Circuit to hold that a bankruptcy court is *forbidden* from enforcing the provisions of Section 1325 under its own authority, as Section 105(a) allows. If, in fact, the debtor can prove undue hardship and the creditor does not dispute the debtor's right to a discharge, the parties can easily stipulate to that effect to resolve the matter if the issue is raised by the bankruptcy court. (Notably, there is no evidence that the debtor here has ever indicated a willingness or ability to make such a showing.) If a debtor cannot satisfy the Code's requirements, the bankruptcy system is far better served by allowing bankruptcy courts to police

their dockets and cut off these abusive tactics at an early stage, rather than requiring them to preside over the duplicative, wasteful, and expensive system the Ninth Circuit's opinion envisions.

V. Debtors Seeking the Equitable Remedy of a Discharge Must Act Equitably Towards Their Creditors

It has often been held that bankruptcy courts are essentially courts of equity. *See, e.g., Katchen v. Landy*, 382 U.S. 323, 327 (1966). It is an established maxim that those who seek equity must behave equitably in turn to those dealing with them. When debtors seek the enormous equitable benefit of a discharge, it is not too much to ask that they afford their creditors the notice rights that Congress has required. Bankruptcy should not be a game of "gotcha," of debtors violating the Rules and attempting to slip provisions past creditors that are following the Rules. Instead, it should be a process by which each party obtains what it is due – nothing more and nothing less.

As noted above, this Court is also considering the case of *Schwab v. Reilly*. In that case, the debtor similarly argues that it managed to slip an unlawful provision past the other parties and is, therefore, entitled to retain a benefit to which it was plainly not entitled. Regardless of how the Court rules on whether the trustee should have understood that the debtor was asserting an

unlawful exemption, it is clear that accepting the debtor's position will require trustees to file objections that would be wholly unnecessary if debtors did not seek to obtain more than the law allows. By the same token, the debtor's approach and that of the Ninth Circuit in this case will also impose added costs and burdens for all parties (including the debtors) to no useful purpose. This Court should ensure that this large and complex system that provides great benefit and relief to those honest but unfortunate citizens suffering from financial stress should not be undermined by the actions of those who seek more than that which they have been granted.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

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No. 08-1134

In The
Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR *AMICUS CURIAE* PROFESSOR RAFAEL I. PARDO IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Amicus curiae Rafael I. Pardo respectfully moves under Supreme Court Rule 37.3(b) for leave to file the accompanying brief in support of neither party in the above-captioned case, *United Student Aid Funds, Inc. v. Espinosa*, which is before the Court on a writ of certiorari from the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Pursuant to Supreme Court Rule 37.3(a), consent of the parties to the filing of the brief was sought, in writing, through counsel. Despite acknowledging the request, neither counsel for the petitioner nor counsel for the respondent provided an answer to the request.

Amicus curiae is a law professor who teaches and writes in the area of bankruptcy law. The discharge of student loans in bankruptcy is a subject in which *amicus* has a special academic interest. His scholarship on this subject has highlighted, among other things, the nonuniform treatment of similarly situated debtors who seek financial relief from their student loans through bankruptcy.[1]

---

[1] *See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am. Bankr. L.J. 179 (2009); Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405 (2005); Rafael I. Pardo, *Illness and Inability to Repay:*

(Continued on following page)

While *amicus* strongly supports the uniform treatment of student-loan debtors in bankruptcy, he believes that, for one dispositive reason, this case does not present an appropriate opportunity for the Court to establish such uniformity: The Court lacks subject-matter jurisdiction to consider Petitioner's claim for relief.

Because subject-matter jurisdiction goes to the heart of the Court's power to decide the case, and because neither party has presented the argument to the Court, *amicus* believes that the accompanying brief will assist the Court in its decision of the appeal. Accordingly, *amicus* respectfully submits that good cause exists for the Court to grant the motion seeking leave to file the accompanying brief.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is fully set forth in the accompanying motion for leave to file this brief.[1]

SUMMARY OF ARGUMENT

Amicus files this brief to point out crucial legal authority that is relevant to the Court's decision of the appeal and that the parties failed to bring to the Court's attention in its review on writ of certiorari. Proper consideration of this authority will reveal that this case should not be before the Court due to lack of subject-matter jurisdiction. Accordingly, the Court should vacate the judgment below and remand the case with instructions to dismiss for lack of subject-matter jurisdiction.

Amicus contends that the failure of United Student Aid Funds, Inc. ("USAF") to file its counter-motion for relief from the bankruptcy court's confirmation order within the time limit prescribed by the Bankruptcy Code deprived the bankruptcy court

[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party. *Amicus* did not receive any monetary contribution for the preparation or submission of this brief apart from the financial support of Seattle University School of Law to defray the costs of printing the brief. The opinions expressed in this brief are those of *amicus* and do not necessarily reflect the views of his academic institution.

of subject-matter jurisdiction to consider USAF's countermotion.[2] The countermotion constituted a request for the bankruptcy court to revoke its confirmation order to the extent that the order approved discharge of USAF's claim against the debtor by declaration. The Bankruptcy Code authorizes a court to revoke a confirmation order only if the moving party requests the relief within 180 days of the date that the order was entered. The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") also incorporate this time limit through direct reference to the Bankruptcy Code. USAF did not file its countermotion until approximately ten years after the bankruptcy court entered the confirmation order in the debtor's Chapter 13 case. Given this Court's decisions emphasizing the jurisdictional nature of statutory time limits, USAF's untimely filing of the countermotion resulted in a jurisdictional defect that cannot be waived or forfeited. Accordingly, the countermotion is nonjusticiable and must be dismissed. Dismissal will not only produce the statutorily and doctrinally correct result in this case, it will also give proper effect to Congress's intent to accord accelerated finality to confirmation orders.

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[2] All references in this brief to the term "Bankruptcy Code" refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended primarily at 11 U.S.C. §§ 101-1532).

ARGUMENT

A court's lack of subject-matter jurisdiction may be raised "at any time in the same civil action, even initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). Although the parties did not raise the issue of subject-matter jurisdiction in the proceedings below, the Court has an affirmative duty to determine the existence of subject-matter jurisdiction. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Freytag v. C.I.R.*, 501 U.S. 868, 896 (1991). This jurisdictional defect cannot be forfeited or waived. *Arbaugh*, 546 U.S. at 514; *see also Freytag*, 501 U.S. at 896-97 ("Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, *i.e.*, the effect of approving, *ex ante*, unlawful action by the appellate court itself."). In this case, the Court must decide whether the bankruptcy court had jurisdiction to entertain USAF's countermotion for relief from the bankruptcy court's confirmation order, which USAF filed after the statutory time period set forth in the Bankruptcy Code. For the reasons set forth below, the bankruptcy court did not have such jurisdiction.

As this Court has observed, "[t]he jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995).

The Judicial Code grants federal district courts original but not exclusive jurisdiction over all civil proceedings that, *inter alia*, arise under the Bankruptcy Code.[3] 28 U.S.C. § 1334(b) (2006). A proceeding arises under the Bankruptcy Code if "it is a cause of action created by the Bankruptcy Code, without existence outside the context of bankruptcy, and otherwise unknown to the law." *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896 (B.A.P. 9th Cir. 1999); *see also Celotex*, 514 U.S. at 325 n.13 (Stevens, J., dissenting) ("'[W]hen a cause of action is one which is created by title 11, then that civil proceeding is one "arising under title 11."'" (alteration in original) (quoting 1 COLLIER ON BANKRUPTCY ¶ 3.01[1][c][iii], at 3-26 (15th ed. 1994))); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987) (holding that core proceeding is one that "invokes a substantive right provided by [the Bankruptcy Code] or . . . that could arise only in the context of a bankruptcy case"). A district court may refer to the bankruptcy court a case under the Bankruptcy Code as well as proceedings that, *inter alia*, arise under the Bankruptcy Code. 28 U.S.C. § 157(a). A bankruptcy court may hear and determine (i.e., enter final judgment in) all core proceedings that arise under the Bankruptcy Code. 28 U.S.C. § 157(b)(1); *see also Marshall v. Marshall*, 547 U.S. 293, 303 (2006) ("A bankruptcy court may exercise plenary power only over 'core

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[3] All references in this brief to the term "Judicial Code" refer to Title 28 of the United States Code.

proceedings.' In noncore matters, a bankruptcy court may not enter final judgment[.]" (citation and footnote omitted)). A proceeding to revoke a Chapter 13 confirmation order is considered to be a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L), and (O). *Midlantic Nat'l Bank v. Kouterick (In re Kouterick)*, 161 B.R. 755, 756 (Bankr. D.N.J. 1993). Accordingly, a bankruptcy court generally has jurisdiction to hear and determine a proceeding to revoke a Chapter 13 confirmation order. However, for reasons that will be discussed below and that are relevant to the disposition of this appeal, such jurisdiction will be lacking if the proceeding is not brought within the time limit prescribed by the Bankruptcy Code.

Bankruptcy Code § 1330(a) provides that, "[o]n request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of [the Bankruptcy Code], and after notice and a hearing, the court may revoke such order if such order was procured by fraud." 11 U.S.C. § 1330(a) (2006).[4] Furthermore, Rule 60 of the Federal Rules of Civil Procedure (the "Federal Rules") applies to bankruptcy cases by virtue of Bankruptcy Rule 9024. Importantly, however, Bankruptcy Rule 9024 specifies that a complaint to revoke a confirmation order must be filed within

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[4] Bankruptcy Code § 1330(b) addresses the consequences of the revocation of a Chapter 13 confirmation order. *See* 11 U.S.C. § 1330(b) (2006).

the time limits set forth in the Bankruptcy Code. *See* FED. R. BANKR. P. 9024(3) (stating that Federal Rule 60 "applies in cases under the Code except that . . . (3) a complaint to revoke an order confirming a plan may be filed *only within the time allowed by § 1144, § 1230, or § 1330*" (emphasis added)).[5] An attempt to seek relief from a bankruptcy court's confirmation order via Rule 60(b) constitutes an attempt to revoke such an order. *See Mason v. Young (In re Young)*, 237 B.R. 791, 802 (B.A.P. 10th Cir. 1999) ("When a party brings a motion under [Federal Rule] 60(b), the party is basically requesting revocation of the confirmed plan.").[6] In these two provisions, one witnesses that

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[5] Bankruptcy Code §§ 1144 and 1230 address the revocation of Chapter 11 and Chapter 12 confirmation orders and the consequences thereof. *See id.* §§ 1144, 1230.

[6] It should be noted that, in a single footnote to one of its opinions, the Second Circuit has characterized a request for relief from a Chapter 13 confirmation order as "an action . . . to declare one of the provisions of a confirmed plan void *ab initio*," rather than an action to revoke a confirmation order. *Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005). Pursuant to this characterization, the Second Circuit has concluded that such a request for declaratory relief is subject only to "the 'reasonable time' limitations of Rule 60(b)(4)" and not the Bankruptcy Code's 180-day time limit for seeking revocation of a confirmation order. *Id.* The Second Circuit's approach thus provides an end-run around the strict time limits set forth in Bankruptcy Code § 1330(a) and incorporated by reference in Bankruptcy Rule 9024. The premise of this approach is that a request for declaratory relief from a confirmation order is a request to vacate the order, not revoke it.

Amicus contends that the Second Circuit's analysis fails in its attempt to establish a distinction between vacating a

(Continued on following page)

Congress – through its enactment of the Bankruptcy Code – and this Court – through its authority to promulgate the Bankruptcy Rules, *see* 28 U.S.C. § 2075 – have clearly set forth a 180-day time limit within which a party may seek to revoke a confirmation order.

The Court must decide whether Bankruptcy Code § 1330(a)'s timely-filing requirement is jurisdictional or simply an element of the cause of action to revoke a confirmation order. If it is jurisdictional, then the

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confirmation order (whether in whole or in part) and revoking a confirmation order (whether in whole or in part). Courts have routinely treated vacating a confirmation order and revoking a confirmation order as equivalents. *See, e.g., Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq)*, 153 F.3d 113, 115 (3d Cir. 1998); *United States v. Lee*, 89 B.R. 250, 256 (N.D. Ga. 1987) (stating that "[m]otions to revoke or vacate a Chapter 13 confirmation order are governed by the requirements of [Bankruptcy Code § 1330(a)]"), *aff'd sub nom. United States v. Hochman (In re Hochman)*, 853 F.2d 1547 (11th Cir. 1988) (per curiam); *In re Swanson*, 312 B.R. 153, 158 (Bankr. N.D. Ill. 2004) ("A confirmation order may be revoked or vacated only for fraud. . . ."); *cf. First Nat'l Bank of Jeffersonville v. Goetz (In re Goetz)*, 2009 WL 1148580, at *3 (Bankr. S.D. Tex. Apr. 24, 2009) (analyzing plaintiff's complaint to vacate Chapter 11 confirmation order as a request for revocation of the order). The general definitions of the words "revoke" and "vacate," both of which are undefined by the Bankruptcy Code and the Bankruptcy Rules, *see* 11 U.S.C. § 101; FED. R. BANKR. P. 9001, justify this approach. *Compare* BLACK'S LAW DICTIONARY 1435 (9th ed. 2009) (listing "revoke" as verb form of the noun "revocation," which is defined as "[a]n annulment, cancellation, or reversal, [usually] of an act or power"), *with id.* at 1688 (defining "vacate" as "[t]o nullify or cancel; make void; invalidate").

requirement circumscribes subject-matter jurisdiction, thus requiring dismissal of USAF's countermotion; if, on the other hand, the requirement is a substantive element (i.e., an essential ingredient) of the cause of action, then dismissal would be inappropriate since (1) failure to state a claim is the appropriate basis for dismissal when a threshold fact has not been established and (2) such dismissal cannot occur post-trial. *See generally Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (explicating "subject-matter jurisdction/ingredient-of-the-claim-for-relief dichotomy" and appropriate ground for relief depending on which is implicated). *Amicus* contends that adherence to the Court's decisions in *Kontrick v. Ryan,* 540 U.S. 443 (2004), and *Bowles v. Russell*, 127 S. Ct. 2360 (2007), requires construing Bankruptcy Code § 1330(a)'s timely-filing requirement as jurisdictional.

In *Kontrick*, this Court held that a party's failure to comply with the Bankruptcy Rule deadline for objecting to a debtor's Chapter 7 discharge did not deprive the bankruptcy court of subject-matter jurisdiction. *Kontrick*, 540 U.S. at 447. The Court reasoned that court-prescribed procedural rules are "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate." *Id.* at 454. In reaching its conclusion, the Court distinguished claim-processing time deadlines from those imposed by statute. In the Court's view, a statutory time constraint *could* limit subject-matter jurisdiction given Congress's authority to delineate

the classes of cases that fall within a court's adjudicatory authority. *See id.* at 452-53. But since there was no statutory time limit in *Kontrick*, subject-matter jurisdiction was not lacking.

The Court further clarified the jurisdictional nature of statutory time constraints in its decision in *Bowles*. In that case, a party failed to file an appeal within the fourteen-day period set forth in both 28 U.S.C. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6). *Bowles*, 127 S. Ct. at 2362. Although the party filed the appeal within the seventeen-day time limit set forth by the district court in its order reopening the time for appeal, the Court held that the party's filing was nonetheless untimely and deprived the court of appeals of subject-matter jurisdiction. *Id.* at 2362. In reaching its holding, the Court affirmed the jurisdictional nature of statutory time limits. *Id.* at 2364 ("Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional. Indeed, those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute."). The Court also distinguished its holding from the decision it issued in *Kontrick*, observing that "[c]ritical to [the *Kontrick* Court's] analysis was the fact that 'no statute . . . specifies a time limit for filing a complaint objecting to a debtor's discharge.'" *Bowles*, 127 S. Ct. at 2364

(omission in original) (quoting *Kontrick*, 540 U.S. at 448). Central to the Court's holding was the fact that 28 U.S.C. § 2107(c) underpinned the deadline set forth in Federal Rule of Appellate Procedure 4(a)(6) and that the rule merely carried the statutory time limit into practice. *Bowles*, 127 S. Ct. at 2366 ("[T]he limit on how long a district court may reopen th[e] period [for filing a notice of appeal] is set forth in a statute, 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), the limitation is more than a simple 'claim-processing rule.'"); *id.* at 2363 (noting that Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice).

Explaining the rationale for the "[j]urisdictional treatment of statutory time limits," *Bowles*, 127 S. Ct. at 2365, the Court observed the following:

> Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. . . . *[I]t is no less 'jurisdictional' when Congress forbids federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment.*

Bowles, 127 S. Ct. at 2365-66 (emphasis added) (citation omitted). Thus, *Bowles* not only stands for

the proposition that statutory time limits are jurisdictional, but also for the proposition that filing deadlines in court-prescribed procedural rules can be jurisdictional if those rules incorporate a federal statutory deadline.

It must be noted that a split of authority has emerged over whether Bankruptcy Code § 1330(a) establishes procurement of a confirmation order through fraud as the only ground for obtaining relief from an order confirming a Chapter 13 plan (the "procurement-by-fraud" ground) or whether relief from such an order can also be sought pursuant to the grounds enumerated in Federal Rule 60 (by virtue of Bankruptcy Rule 9024).[7] For purposes of deciding whether the bankruptcy court lacked jurisdiction to hear USAF's countermotion for relief, however, the Court need not decide which view is correct.

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[7] For the argument that Bankruptcy Code § 1330(a) provides the sole basis for revoking a Chapter 13 confirmation order, see, for example, *Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq)*, 153 F.3d 113 (3d Cir. 1998); *Duplessis v. Valenti (In re Valenti)*, 310 B.R. 138, 145-48 (B.A.P. 9th Cir. 2004); *Mason v. Young (In re Young)*, 237 B.R. 791, 800-03 (B.A.P. 10th Cir. 1999), *aff'd on other grounds*, 237 F.3d 1168 (10th Cir. 2001); *United States v. Lee*, 89 B.R. 250, 256 (N.D. Ga. 1987), *aff'd sub nom. United States v. Hochman (In re Hochman)*, 853 F.2d 1547 (11th Cir. 1988) (per curiam). For the argument that Bankruptcy Rule 9024 provides additional grounds for revoking a Chapter 13 confirmation order, see, for example, *In re Swanson*, 312 B.R. 153, 158 (Bankr. N.D. Ill. 2004); *In re Abrams*, 305 B.R. 920, 922-24 (Bankr. S.D. Ala. 2002); *In re Hudson*, 260 B.R. 421, 444 (Bankr. W.D. Mich. 2001).

Regardless of the *basis* for the revocation request, that request must be made within 180 days of the entry of the confirmation order. *Cf. Duplessis v. Valenti (In re Valenti)*, 310 B.R. 138, 145 (B.A.P. 9th Cir. 2004) (stating that complaint to revoke Chapter 13 confirmation order cannot be brought after expiration of 180-day time limit set forth in Bankruptcy Code § 1330(a), even if confirmation order was procured by fraud that was concealed and that remained undiscovered until after the time limit expired) (citing *Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.)*, 961 F.2d 1445 (9th Cir. 1992)).[8] If Bankruptcy Code

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[8] Courts that have relieved a party from a Chapter 13 confirmation order on the basis of Federal Rule 60 (via Bankruptcy Rule 9024) have generally done so when notice of the order was constitutionally inadequate. *See supra* note 7. But those courts have not squarely addressed whether Bankruptcy Code § 1330(a)'s 180-day time limit would bar the request for relief even in the context of constitutionally defective notice. *See Swanson*, 312 B.R. at 155, 157 (noting that (1) Chapter 13 confirmation order was entered on August 25, 2003, (2) Chapter 13 trustee objected to IRS secured claim on November 21, 2003, and (3) IRS responded to trustee's objection by filing a countermotion to vacate or revoke the bankruptcy court's confirmation order; but failing to (i) specify date of IRS's countermotion and (ii) discuss Bankruptcy Rule 9024(3) and its incorporation of Bankruptcy Code § 1330(a)'s time limit); *Abrams*, 305 B.R. at 922-23 (allowing Bankruptcy Rule 9024 relief seven months after entry of Chapter 13 confirmation order, notwithstanding that creditor's relief motion was filed outside Bankruptcy Code § 1330(a)'s 180-day window; but failing to discuss Bankruptcy Rule 9024(3) and its incorporation of Bankruptcy Code § 1330(a)'s time limit); *Hudson*, 260 B.R. at 444, 445 (failing to discuss Bankruptcy Rule 9024(3) and its

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§ 1330(a) provides the sole basis for relief, then failure to comply with the statute's 180-day limit deprives the bankruptcy court of subject-matter jurisdiction to entertain USAF's countermotion for relief. If Bankruptcy Rule 9024 provides additional grounds for relief, such that it was permissible for USAF to seek relief from the confirmation order on the basis of Federal Rule 60(b)(4), USAF's failure to seek such relief within the 180-day limit equally constitutes a jurisdictional defect. Although Bankruptcy Rule 9024 is a court-prescribed procedural rule, it nonetheless incorporates the statutory deadline in Bankruptcy Code § 1330. In this regard, the situation before the Court is

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incorporation of Bankruptcy Code § 1330(a)'s time limit, and noting that creditor did not seek relief from Chapter 13 confirmation order under either Bankruptcy Code § 1330(a) or Bankruptcy Rule 9024).

The dissenting opinion in *Fesq*, however, which argued that Federal Rule 60 (via Bankruptcy Rule 9024) provides additional grounds for relief from a Chapter 13 confirmation order, 153 F.3d at 120-24 (Stapleton, J., dissenting), acknowledged that the 180-day limit for revoking a Chapter 13 confirmation order cannot be circumvented via Rule 60(b), *see id.* at 123 (Stapleton, J. dissenting) ("While my reading of the Code and Rules would permit claims of a limited variety, other than fraud, to be filed during that period, *it would not extend the date upon which a confirmation order becomes unchallengeable*." (emphasis added)). In further support of this point, see, for example, FED. R. BANKR. P. 9024 advisory committee note ("Clauses (2) and (3) of this rule make it clear that the time periods established by §§ 727(e), 1144, and 1330 of the Code may not be circumvented by the invocation of F.R. Civ. P. 60(b)."); *Valenti*, 310 B.R. at 147 ("[W]e follow other courts that have held that Rule 60(b) cannot be used to evade the 180-day time limit in Section 1330(a).").

like *Bowles* – that is, a time deadline in a court-prescribed procedural rule that is underpinned by a statutory deadline – and unlike *Kontrick* – that is, a time deadline in a court-prescribed procedural rule that is *not* underpinned by a statutory deadline. Therefore, in light of the Court's emphasis on the "jurisdictional significance of the fact that a time limit is set forth in a statute," *Bowles*, 127 S. Ct. at 2364 n.2, *amicus* contends that the statutory time limit set forth in Bankruptcy Code § 1330(a), and incorporated by reference in Bankruptcy Rule 9024, eliminates subject-matter jurisdiction in this case.[9]

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[9] *Amicus* recognizes the possibility that one could narrowly interpret the Court's holding in *Bowles* to mean that, while statutory time limits may be jurisdictional, not all such time limits need be jurisdictional. Indeed, one might choose to characterize some statutory time limits as mandatory but nonjurisdictional (and thus subject to forfeiture or waiver if not timely invoked by the party for whose benefit the time limit exists). *Cf. Eberhart v. United States*, 546 U.S. 12, 15-19 (2005) (per curiam) (discussing mandatory but nonjurisdictional nature of claim-processing rules and their susceptibility to forfeiture). Even under this view, however, *amicus* contends that *Bowles* can be read broadly for the proposition that, in the interests of finality, statutory time limits for direct attacks on final judgments (such as the appeal involved in *Bowles*) are jurisdictional. On this reading of *Bowles*, it is consistent to interpret the time limit set forth in Bankruptcy Code § 1330(a) as jurisdictional given that revocation of a confirmation order constitutes a direct attack on a final judgment of the bankruptcy court. *See infra* note 10.

It also matters not that the general statutory provisions conferring jurisdiction to the federal district courts (and, by reference, to the federal bankruptcy courts) over proceedings

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In this case, USAF failed to comply with Bankruptcy Code § 1330(a) as well as Bankruptcy Rule 9024, both of which set a filing deadline for commencing an action to revoke a Chapter 13 confirmation order. Bankruptcy Code § 1330(a) provides that such relief must be sought "[o]n request of a party in interest *at any time within 180 days after the date of the entry of an order of confirmation*," 11 U.S.C. § 1330(a) (emphasis added), and Bankruptcy Rule 9024 provides that, while Federal Rule 60 applies in bankruptcy cases, "a complaint to revoke an order confirming a plan may be filed *only within the time allowed by . . . § 1330*," FED. R. BANKR. P. 9024(3) (emphasis added). It is abundantly clear that USAF sought revocation of the bankruptcy court's confirmation order well after the 180-day time limit had expired. The bankruptcy court entered the confirmation order in 1993. Pet. for Writ of Cert. at 4. In 2003, the debtor filed a motion to enforce the discharge injunction in his bankruptcy case. Br. for Pet'r at 9. USAF responded in 2004 – more than ten years after entry of the confirmation order – by filing a countermotion under Rule 60(b)(4) for relief from

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that arise under the Bankruptcy Code do not contain a timeliness condition for proceedings that seek to revoke a confirmation order. As this Court has observed, "'[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants.'" *Bowles*, 127 S. Ct. at 2364 (alteration in original) (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003)).

the bankruptcy court's confirmation order.[10] Br. for Pet'r at 9. Because USAF failed to file its countermotion in a timely manner, the bankruptcy

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[10] USAF's countermotion constituted a direct attack on a final judgment of the bankruptcy court. *See Celli v. First Nat'l Bank of Northern N.Y. (In re Layo)*, 460 F.3d 289, 294 (2d Cir. 2006) (concluding that Chapter 13 confirmation order constitutes a final judgment on the merits); 18 MOORE'S FEDERAL PRACTICE § 131.02[1][a], at 131-13 (3d ed. 2009) (defining direct attack on a judicial proceeding as "an attempt to have it corrected, annulled, reversed, vacated, or declared void" and noting that Federal Rule 60 is one method of directly attacking a judgment); *see also Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916, 932-35 (B.A.P. 9th Cir. 1998) (Klein, J., concurring in part and dissenting in part) (arguing that Rule 60(b)(4) motion for relief from a confirmation order should be construed as a direct attack on a final judgment), *aff'd*, 193 F.3d 1083 (9th Cir. 1999). The characterization of USAF's countermotion as a direct attack on a final judgment has significance for purposes of ascertaining the applicability of *res judicata* principles in this case. Because such principles are inapplicable to direct attacks on judgments, *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985); 18 MOORE'S FEDERAL PRACTICE, *supra*, § 131.02[1][a], at 131-13 n.1 (citing *Watts* for proposition that "*res judicata* does not apply to direct attacks on judgments"), *amicus* urges the Court to disregard any arguments by the parties premised on such principles. For the argument that a Rule 60(b)(4) motion for relief from a confirmation order, like the one brought by USAF in this case, is not subject to *res judicata* principles, see *Pardee*, 218 B.R. at 932-35 (Klein, J., concurring in part and dissenting in part). It should be noted that USAF has made this argument in its brief on the merits. *See* Br. for Pet'r at 36.

court lacked jurisdiction to consider USAF's claim for relief.[11]

CONCLUSION

As this Court has observed, "[i]t is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Although dismissal for lack of

[11] USAF cannot rely on its use of ersatz procedure (i.e., seeking relief by motion rather than by complaint) as a basis for evading the timely-filing requirement for bringing an action to revoke a Chapter 13 confirmation order. While true that the Bankruptcy Rules provide that a proceeding to revoke confirmation of a Chapter 13 plan is an adversary proceeding, FED. R. BANKR. P. 7001(5), and that such a proceeding must be commenced by the filing of a complaint, FED. R. BANKR. P. 7003, authority exists for the proposition that, if revocation is sought by motion, the procedural fault may be waived if the debtor fails to object, *In re Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990). In this case, the debtor did not object to USAF proceeding by motion to revoke the confirmation order. Accordingly, the substantive rules governing revocation of a confirmation order apply notwithstanding that USAF did not follow proper procedure. It is quite ironic that, in a case where USAF accuses the debtor of using improper procedure to discharge his student loans (i.e., by declaration rather than by adversary proceeding), *see, e.g.*, Br. for Pet'r at 16, 24-26, USAF itself failed to initiate an adversary proceeding when procedurally required to do so.

subject-matter jurisdiction may be perceived to lead to a harsh result in this case, it certainly does not lead to an absurd result. Rather, the result would give effect to Congress's policy to give confirmation orders an accelerated degree of finality – to wit, authorizing a court to revoke a confirmation order only if the relief is requested within 180 days of the date of entry of the order. *See Fesq*, 153 F.3d at 120 ("Revoking a confirmation order is a measure that upsets the legitimate expectations of both debtors and creditors. Interpreting Section 1330(a) as a limiting provision permits such disruption in only a very narrow category of egregious cases." (footnote omitted)); *Educ. Credit Mgmt. Corp. v. Robinson (In re Robinson)*, 293 B.R. 59, 65 (Bankr. D. Or. 2002) ("In the final analysis, § 1330(a) must be construed as Congress' acknowledgement that confirmation orders are indeed different than other orders. 'Any other result does harm to the finality normally accorded confirmation orders and specifically provided for by Congress in § 1327(a).'" (quoting *In re Ritacco*, 210 B.R. 595, 599 (Bankr. D. Or. 1997))); *cf. Taylor v. Freeland & Kronz*, 503 U.S. 638, 744 (1992) ("Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality.").

This is not to say that USAF will be unable to obtain relief from the bankruptcy court's confirmation order. As mentioned before, this is a case involving direct attack, *see supra* note 10, an avenue of relief that has been foreclosed. Nonetheless, the possibility still may exist for collateral attack of the bankruptcy

court's confirmation order in subsequent proceedings. Whether such attack would be allowed depends on the applicability of *res judicata* principles.[12] USAF alleges that it did not receive constitutionally adequate notice of the treatment of its claim provided for by the debtor's Chapter 13 plan. Br. for Pet'r at 51-58. If this proves to be true, this could be a basis for denying the confirmation order preclusive effect in subsequent litigation between USAF and the debtor. *See Piedmont Trust Bank v. Linkous (In re Linkous)*, 990 F.2d 160, 162 (4th Cir. 1993); *cf. Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2207 (2009) ("Nor do we decide whether any particular respondent is bound by the 1986 Orders [i.e., a Chapter 11 confirmation order and an insurance settlement order, which was incorporated by reference into the confirmation order]. We have assumed that respondents are bound, but the Court of Appeals did not consider this question. Chubb [Indemnity Insurance Company] . . . has maintained that it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope. The District Court rejected this argument, but the Court of Appeals did not reach it. On remand, the Court of Appeals can take up this objection and any others that respondents have preserved." (citations omitted)).

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[12] For an explanation of why *res judicata* principles are inapplicable to the matter before the Court, see *supra* note 10.

For the foregoing reasons, the Court should vacate the judgment below and remand the case with instructions to dismiss, for lack of subject-matter jurisdiction, USAF's countermotion.[13]

Respectfully submitted,

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[13] If the Court disagrees that it lacks subject-matter jurisdiction in this case and decides to consider the questions presented to the Court by the parties, *amicus* urges the Court to recognize that its decision of the appeal could be interpreted as implicitly validating those decisions that have recognized Federal Rule 60 as an appropriate basis for relief from a confirmation order. As previously mentioned, a split of authority exists over this issue. *See supra* note 7 and accompanying text. Because the issue does not fall within the questions presented on which certiorari was granted, and because the Court ordinarily does not decide in the first instance an issue that was not decided below, *see NCAA v. Smith*, 525 U.S. 459, 470 (1999); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981), the writ of certiorari should be dismissed as improvidently granted if the Court decides not to dismiss the case on the basis of lack of subject-matter jurisdiction.